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AGENCY IMPLEMENTAION

OF

THE MONTANA ENVIRONMENTAL POLICY ACT

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The Montana Environmental Policy Act (MEPA), 75-1-101, MCA (1981), was passed by the Legislature and became law in 1971. The stated purpose of the act is "... to declare a state policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council." 75-1-102. In 75-1-103, it is declared that ... "the continuing policy of the State of Montana, in cooperation with the federal government and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans."

The principal tool designed to achieve these goals is the requirement that state agencies prepare a detailed statement

describing the impact of major actions of state government significantly affecting the quality of the human environment.[1] Each environmental impact statement (EIS) must discuss:

> ... any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> ... alternatives to the proposed action;
>
> ... the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;
>
> ... any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 75-1-201 (i)(a)(iii)

While this general mandate sounds unequivocal, there has been and still is considerable controversy concerning the actual effect of the language on agency actions. Two important and somewhat intertwined issues constitute the nucleus of this controversy:

(i) What effect on MEPA and the EIS requirement does express language in other statutes have when an agency is acting thereunder in considering a proposed action, i.e. in reviewing a permit application? Does the more specific mandate in the permitting statute circumscribe the agencies' general responsibilities under MEPA?

(ii) Does MEPA grant agencies the authority to prevent a proposed action from taking place in light of information obtained in the EIS process? More specifically, may an agency deny a permit solely on MEPA grounds?

To date only the first of these two issues appears to have been resolved, and perhaps only in part.[2] In 1976, the Montana Supreme Court had before it a case in which it analyzed the effect of MEPA on agency decision making when acting pursuant to other state laws. The case, Montana Wilderness Association v. Board of Health and Environmental Sciences[3] concerned the removal by the Department of Health and Environmental Sciences of sanitary restrictions on the proposed Beaver Creek South Subdivision to be located in Gallatin County. The jurisdiction of the department arose under the Sanitation in Subdivisions Act[4], which requires the department to review proposed subdivisions for water supply, sewage disposal, and solid waste disposal. Concurrent with its review of the above criteria, the department prepared an environmental impact statement stemming from the proposed state action of removing sanitary restrictions on the Beaver Creek South Subdivision. Thirty days after the issuance of a final environmental impact statement, the department issued and delivered to Beaver Creek a certificate removing the sanitary restrictions on its plat. Just prior to this event, the Montana Wilderness Association commenced an action in District Court seeking a permanent injunction preventing this action from taking place. The suit alleged that the environmental impact statement prepared by the department was inadequate and as such the department had failed to comply with MEPA. The District Court, having conducted a detailed comparison

of the EIS with the requirements set out in MEPA, found that the procedure adopted by the department in promulgating the EIS was wholly inadequate to meet the standards established in the statute.[5]

The Supreme Court heard the case on appeal and on July 22, 1976 issued an opinion that affirmed the District Court's decision. The court held that the department was indeed required by MEPA to conduct a comprehensive review of the environmental consequences of its decision regarding sanitary restrictions and that the EIS prepared thereunder was procedurally inadequate due to an insufficient discussion and consideration of the full range of environmental factors required by MEPA. On December 30, 1976, however, the court made a strange turnaround and issued a second opinion, following a rehearing, which completely reversed the earlier decision. In a 180 degree shift, the court held that the Sanitation in Subdivisions Act dictates that the Health Department act only in accordance with those criteria specifically expressed in the act, i.e. consider only sewage, solid waste, and water supply. The court reasoned that MEPA could not expand the department's review of subdivisions beyond those specific criteria since this would create a direct conflict with the legislative policy of local control as expressed in the Subdivision and Platting Act.[6]

Although this ruling has invited strong criticism,[7] it must be regarded at this time as the law on the matter. Given this interpretation, it must also be accepted that an agency's responsibilities under MEPA can in fact be circumscribed by other statutes. Whether

or not this holding will be limited to those instances where a state versus local control element exists is somewhat unclear and left to further judicial interpretation. Moreover, whether this result was intended by the Legislature in light of language in MEPA which states: "The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state."[8] is even further in doubt.

The second issue of critical and controversial significance regarding MEPA and the EIS requirement, the question of what substantive value an EIS has in agency decision-making, has not yet been resolved by the Montana courts.[9] It is sometimes stated however that this issue was heard and decided by the Supreme Court in the Beaver Creek South case.[10] As mentioned earlier, that case held only that MEPA could not extend state control over subdivisions beyond matters of water supply, sewage, and solid waste, since this would be in direct conflict with the policy of local control as expressed in the Subdivision and Platting Act. A more expansive interpretation of that decision may not only be erroneous but harmful and misleading to agencies as they proceed in implementing the act.

Whether this issue is ultimately resolved by the courts or the Legislature, an examination of agency implementation of MEPA, through compliance with the EIS requirement may be appropriate. From the outset there has been substantial variation among agencies in their approach to implementing MEPA. The first Environmental Quality

Council, in October of 1971, issued a set of interim guidelines to assist agencies in the preparation of environmental impact statements.[11] The subsequent internal procedures adopted by the agencies ranged from those of extreme simplicity to others which constituted a comprehensive, carefully prepared outline. Some agencies did not prepare any internal procedures.[12] Additionally, there was a lackluster effort by agencies to comply with Section 69-6505, RCM, 1947[13] which required all agencies of the state to review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of identifying inconsistencies and discrepancies which would prevent full compliance with the purposes and provisions of MEPA.[14] Any such discrepancy was to be reported to the governor and the EQC by July 1, 1972 along with proposed measures for remedying the conflict. The apparent failure of one agency to diligently comply with this directive may have been the cause of costly litigation several years later. In 1979 the Montana Supreme Court issued a decision in Kadillak v. Anaconda Company[15], a case which involved a conflict of MEPA with the Hard-Rock Mining Act.[16] The statutory time frame given for agency action on permit applications was incompatible with the requirement that an EIS be prepared prior to taking action. Following clear federal precedent the court held that because this constituted an irreconcilable conflict, an EIS would not be required. Interestingly, the 1977 Legislature had already amended the Metal Mine Act creating flexibility in the time frame to allow for EIS preparation in all future

applications.[17]

Nonetheless in the first year of its existence, MEPA was responsible for the production of 64 EISs.[18] Although there is no real indication of whether or not the information contained in these documents was considered in the decision-making process, this does represent an attempt at good faith compliance by most agencies. If the system did not operate entirely as the Legislature had intended, it was perhaps largely due to a genuine lack of understanding on the part of the agencies, including the EQC, as to what role an EIS was required to play in the decision-making process. Evidence of this is the fact that the early EQC guidelines were absent a discussion of how the EISs were expected to be utilized. It was not until the rules had been revised for the third time that the EQC included a discussion of the EISs role in agency planning and decision-making.[19] Significantly this inclusion occurred only after it had been determined that the EQC actually lacked any authority to impose its guidelines on executive branch agencies. The EQC's authority to act in this regard had previously been questioned from time to time and even the EQC seemed to exhibit a lack of confidence in its ability to prescribe rules.[20]

It was not until 1975, however, that this issue was finally resolved. On April 17 the First Judicial District Court decided the Montana Wilderness Association v. The Board of Land Commissioners[21] case. In that case the court held that the EQC's guidelines were unenforceable since the powers of the EQC staff were limited to the

making of studies and recommendations. The court in its dicta also strongly criticized both the executive and legislative branches of the state government for failing to develop a workable system for effective enforcement of MEPA.

This chastisement resulted in an almost immediate response by the governor. On April 30, 1975 Thomas Judge by executive order created a commission on environmental quality, the CEQ, which was directed to work with the EQC and other agencies of the executive branch and the public to promulgate uniform MEPA rules.[22] In November a public hearing was held on proposed rules and on January 15, 1976 a final revision of the model rules was issued which incorporated, to a certain extent, the comments and suggestions received at the hearing.[23] These rules did not, however, include a provision outlining the proper use of an EIS as was found in the May 1975 EQC guidelines. The executive branch agencies when adopting these rules also did not choose to include any such provision of their own.

Although purposefully critical in its analysis, an EQC staff report by Steven Perlmutter, entitled The Montana Environmental Policy Act - The First Five Years, provides a general understanding of the early years of MEPA implementation. Perlmutter takes the position that MEPA does have substantive importance that imposes definite requirements on agency actions. While in his view the EIS was often relegated to an improper subordinate role and perhaps even used as a mere defense against litigation in some instances, he does

admit that the EIS process was partially serving its purpose.[24] The principal reason given for this conclusion was that public awareness and participation in the EIS process tended to make agencies more aware of environmental concerns and they were therefore making fewer decisions behind closed doors without adequate data supporting their actions. Additionally, he felt that private developers were beginning to consider environmental factors in their planning process prior to seeking agency approval for proposed projects.

Looking beyond the first five years of MEPA, it can be reported that since the publication of Perlmutter's report, no drastic changes have occurred in the general treatment and perception of MEPA and the EIS process by agency personnel. Prior to the very recent action by the District Court in the Cabinet Resource Group case[25], the significance of which has not yet been fully assessed, only two notable events have occurred since Perlmutter's report was written.[26] The first is the Beaver Creek South decision II. Even though this did not decide the procedural versus substantive issue, it continues to be cited by many as having done so. For that reason, in a practical sense, it has contributed to MEPA being regarded as strictly procedural by many persons, including members of state government.

The other noteworthy event was the re-establishment of the Commission on Environmental Quality by Governor Judge on March 8, 1978, for the purpose of re-evaluating and updating the model MEPA rules.[27] As was done by the first CEQ, a draft set of rules was

initially prepared and distributed to agencies and interested persons for comment. Following a public hearing, a revised set of model rules was prepared and later adopted by most of the executive agencies.[28] While the rules were not a sharp departure from the earlier version, they did attempt to clarify ambiguities that may have existed. One interesting side note is that the rules in draft form included an exception from the EIS requirements for the production of EISs in the case of agency rule-making. Because this was contrary to apparent legislative intent in light of the fact that a bill attempting to do the same had been defeated by the 1979 Legislature[29], the CEQ was harshly criticized and chose to omit this from the final form.[30] A summary of the comments received on the proposed changes appeared in the Montana Administrative Register on January 17, 1980 along with publication of the rules in final form.[31]

Since the adoption of the new rules, there appears to be a tendency growing among agency personnel toward viewing the EIS process as an important aid in decision-making.[32] If this is the case, then it follows that environmental impact statements may be presently serving a substantive role in many instances. If in fact MEPA was intended to be substantive, then perhaps most agencies are now in substantial compliance with its mandates. Before action is taken, however, to insure full compliance by all agencies, the EQC may wish to make its own determination on the substantive versus procedural MEPA issue. Indeed if MEPA is determined to be merely procedural in nature, then all agencies may already be in full compliance.[33]

R E F E R E N C E S

1 In addition, agencies were authorized and directed to: (i) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact of man's environment; (ii) identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations; 75-1-201 (1) (b) (i); (ii) MCA (1981).

2 A very recent case decided by the First Judicial District Court on January 25, 1982, Cabinet Resource Group v. Department of State Lands, No. 43914, dealt with the second issue. This decision is expected to be appealed.

3 171 Mont. 477 559 P.2d 1157 (1976) (Haswell, J, dissenting).

4 MCA Section 76-4-101 et seq. (1981).

5 Ibid at 506. The District Court expressly declined to review the substantive merit of the department's reasoning.

6 MCA Section 76-3-101 et seq. (1981).

7 Justice Haswell, in bitter dissent, was convinced that the local jurisdiction argument was a blatant "red herring" in this case.

8 MCA Section 75-1-201 (1981).

9 As mentioned earlier, there is a recent lower court decision regarding this issue in the Cabinet Resource Group case.

10 A common interpretation of that case is that it held that MEPA is merely procedural.

11 See Appendix "A".

12 Environmental Quality Council, First Annual Report 126 (1972).

13 This section has since been repealed in recodification.

14 Environmental Quality Council, First Annual Report 129 (1972).

15 __Mont.___, 602 P.2d 147 (1979).

16 MCA Section 82-4-101 et seq. (1981).

17 MCA Section 82-4-337 (1)(b)(ii) (1981).

18 Environmental Quality Council, First Annual Report 127 (1972).

19 See Section 6 Environmental Quality Council, Uniform Rules for Environmental Impact Statements, May 29, 1975.

20 Philip D. Tawney, Are The Montana Environmental Policy Act and the Environmental Quality Council Doing Their Job? A Statutory and Agency Overview 27 (1976) (Unpublished report in partial fulfillment of Master's Degree requirements at University of Michigan; a copy is on file at the EQC offices)

21 Montana Wilderness Association v. The Board of Land Commissioners, First Judicial District of Montana, No. 38544 (1975).

22 Executive Order No. 4-75 (1975).

23 These rules as adopted by the Board and Department of Health and Environmental Sciences appear as Appendix "E".

24 S. Perlmutter, The Montana Environmental Policy Act - The First Five Years 25 (1976).

25 First Judicial District of Montana, No. 43914 (1982).

26 There has been considerable unsuccessful activity in the Legislature concerning MEPA which is not discussed in this report. See Deborah B. Schmidt, Report to Environmental Quality Council on Legislative History of the Montana Environmental Policy Act and the Environmental Quality Council, July 13, 1981. See Appendix "I".

27 Executive Order No. 4-78 (1978).

28 These rules as adopted by the Department of State Lands appear in the Appendix as "G".

29 SB 506, sponsored by Senator Roskie (1979).

30 The Department of Agriculture, in error, adopted the draft version.

31 See Appendix "G".

32 At an EQC meeting on November 16, 1981, representatives from the Departments of Health and Environmental Sciences, Highways, Natural Resources and Conservation, and Fish, Wildlife, and

Parks indicated that the EIS process is in most cases useful in agency decision-making. The Departments of Commerce and State Lands did not respond to this inquiry, while the Department of Agriculture chose not to participate at the meeting. See minutes of this meeting.

33 A possible exception may be in the area of agency rulemaking where most agencies rarely if ever elect to prepare EISs.

69-6512. Appointment of employees. The executive director, subject to the approval of the council may appoint whatever employees are necessary to carry out the provisions of this act, within the limitations of legislative appropriations.

History: En. Sec. 12, Ch. 238, L. 1971.

69-6513. Term and removal of the executive director. The executive director is solely responsible to the environmental quality council. He shall hold office for a term of two (2) years beginning with July 1 of each odd-numbered year. The council may remove him for misfeasance, malfeasance or nonfeasance in office at any time after notice and hearing.

History: En. Sec. 13, Ch. 238, L. 1971.

69-6514. Duties of executive director and staff. It shall be the duty and function of the executive director and his staff

(a) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determing whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in section 3 (69-6503) of this act, and to compile and submit to the governor and the legislative assembly studies relating to such conditions and trends;

(b) to review and appraise the various programs and activities of the state agencies in the light of the policy set forth in section 3 (69-6503) of this act for the purpose of determing the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the governor and the legislative assembly with respect thereto;

(c) to develop and recommend to the governor and the legislative assembly, state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state;

(d) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(e) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(f) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the legislative assembly requests;

(g) to analyze legislative proposals in clearly environmental areas and in other fields where legislation might have environmental consequences, and assist in preparation of reports for use by legislative committees, administrative agencies, and the public.

(h) to consult with, and assist legislators who are preparing environmental legislation, to clarify any deficiencies or potential conflicts with an overall ecologic plan.

(i) to review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities, and with a general ecologic perspective, and to suggest legislation to remedy such situations.

(j) to transmit to the governor and the legislative assembly annually, and make available to the general public annually, beginning July 1, 1972, an environmental quality report concerning the state of the environment which shall contain

(1) the status and condition of the major natural, manmade, or altered environmental classes of the state, including, but not limited to, the air, the aquatic, including surface and ground water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment;

(2) the adequacy of available natural resources for fulfilling human and economic requirements of the state in the light of expected population pressures;

(3) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the state in the light of expected population pressures;

(4) a review of the programs and activities (including regulatory activities) of the state and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and

(5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

History: En. Sec. 14, Ch. 238, L. 1971.

69-6515. Examination of records of government agencies. The environmental quality council shall have the authority to investigate, examine and inspect all records, books and files of any department, agency, commission, board or institution of the state of Montana.

History: En. Sec. 15, Ch. 238, L. 1971.

69-6516. Hearings by council — enforcement of subpoenas. In the discharge of its duties the environmental quality council shall have authority to hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses, and the production of any papers, books, accounts, documents and testimony, and to cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in the district court. In case of disobedience on the part of any person to comply with any subpoena issued on behalf of the council, or any committee thereof, or of the refusal of any witness to testify on any matters regarding which he may be lawfully interrogated, it shall be the duty of the district court of any county or the judge thereof, on application of the environmental quality council to compel obedience by proceedings for contempt as the case of disobedience of the requirements of a subpoena issued from such court on a refusal to testify therein.

History: En. Sec. 16, Ch. 238, L. 1971.

69-6517. Consultation with other groups — utilization of services. In exercising its powers, functions, and duties under this act, the council shall

(a) consult with such representatives of science, industry, agriculture, labor, conservation organizations, educational institutions, local governments and other groups, as it deems advisable; and

(b) utilize, to the fullest extent possible, the service, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the commission's activities will not unnecesarily overlap or conflict with similar activities authorized by law and performed by established agencies.

History: En. Sec. 17, Ch. 238, L. 1971.

Effective Date
Section 18 of Ch. 238, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved March 9, 1971.

APPENDIX "A"

Revised Guidelines*

For Environmental Impact Statements required by the Montana Environmental Policy Act of 1971

Adopted by Environmental Quality Council, July 21, 1972

1. PURPOSE

The purpose of Section 69-6504 (b) (3) of the Montana Environmental Policy Act (MEPA) and of these guidelines is to incorporate into the agency decision-making process careful and thorough consideration of the environmental effects of proposed actions, and to assist agencies in implementing the MEPA in a uniform, deliberate manner.

2. POLICY

a. As early as possible and in all cases prior to any agency decision concerning major action or recommendation or a proposal for legislation that significantly affects the environment, State agencies shall, in consultation with other appropriate agencies and individuals, both in the public and private sectors, assess in detail the potential environmental impact in order that adverse effects are avoided and environmental quality is maintained, enhanced, or restored to the fullest extent practicable. In particular, it is especially important that alternative actions that will minimize adverse impacts shall be explored and both the long and short-range implications to the human environment and to nature shall be evaluated in order to avoid, to the fullest extent practicable, undesirable consequences for the environment as a whole.

The language in Section 69-6504 is intended to assure that all agencies of the State shall comply with the directives set out in said Section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

b. For the purpose of implementation of the MEPA, the term "human environment" is to be broadly construed to include not only social, economic, cultural, and esthetic factors, but is also, and particularly, intended to include the biophysical properties of natural ecosystems, including plants, animals, man, their relationship with each other, and with all environmental components of air, water, and land: otherwise known as "ecology".

3. AGENCY PROCEDURES

a. Each agency shall establish its own formal procedures for:

(1) Identifying those agency actions and decisions requiring environmental statements, the appropriate time prior to decision for the consultation required by Section 69-6504 (b) (3) and the agency review process for which environmental statements are to be available;

(2) Obtaining information required in their preparation;

(3) Designating the officials who are to be responsible for the statements;

(4) Consulting with and taking account of the comments of appropriate agencies, and the public, whether or not a statement is prepared; and

(5) Meeting the requirements of Section 69-6504 (b) (3) for providing timely public information on plans and programs with environmental impact, including procedures responsive to Section 8 of these guidelines. These procedures should be consistent with the guidelines contained herein. Each agency should file a copy of all such procedures with the Environmental Quality Council (EQC) which will provide advice to agencies in the preparation of their procedures and guidance on the application and interpretation of the Council's guidelines.

In addition, it is suggested that each agency prepare a flow chart outlining its EIS procedure. The flow chart should include all points of review and decision-making, and divisions of individual responsibility.

4. STATE AGENCIES INCLUDED

Section 69-6504 (b) (3) applies to all agencies of the State government. Each agency shall comply with the requirements unless the agency demonstrates that existing law applicable to its operations expressly prohibits or makes compliance impossible.

5. ACTIONS INCLUDED

The following criteria shall be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement.

a. Actions include, but are not limited to:

(1) Recommendations or favorable reports relating to legislation, including that for appropriations. The requirement for following the Section 69-6504 (b) (3) procedure as elaborated in these guidelines applies to both

(a) agency recommendations on their own proposals for legislation; and

*Freely adapted from the Federal guidelines as published in 36 Federal Register, 7724-7729, April 23, 1971.

(b) agency reports on legislation initiated elsewhere. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental impact statement.)

(2) Projects, programs, and continuing activities: directly undertaken by state agencies; supported in whole or in part through state funds or involving a state lease, permit, license, certificate or other entitlement for use;

(3) Policy, regulations, and procedure making.

b. The statutory clause "major actions of State government significantly affecting the quality of the human environment" shall be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized and seemingly insignificant in their impact, but if there is a potential that the environment may be significantly affected, the statement shall be prepared.

In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many State decisions about a project or a complex of projects can be individually limited but cumulatively considerable. Examples are when one or more agencies over a period of years puts into a project individually minor but collectively major resources, or when several government agencies individually make decisions about partial aspects of a major action. The guiding principle is that the whole can be greater than the sum of the parts. The lead agency shall prepare an environmental impact statement if it is foreseeable that a cumulatively significant impact on the environment will arise from State action. "Lead agency" refers to the State agency which has primary authority for committing the State government to a course of action with significant environmental impact. As necessary, the Environmental Quality Council will assist in resolving questions of lead agency determination.

c. On predictably controversial issues, agencies shall prepare pre-draft outlines of environmental impact statements. These outlines shall be circulated in a timely fashion to selected public agencies, to selected private groups and individuals, and to private groups and individuals whose interests will be significantly affected by the proposed action, for review and comment. Agencies shall give careful consideration to the comments and suggestions elicited by this process when they prepare their draft environmental impact statement.

d. When an agency responsible for the issuance of a state lease, permit, license, certificate, or other entitlement for use, should be able to foresee that the issuance of a large number of such entitlements will, cumulatively, have a significant impact upon the environment, an environmental impact statement shall be prepared. Normal agency procedures, as delineated in Section 3 above, shall be used in the preparation of such an impact statement. Information supplied by applicants for these entitlements may be used or considered in the preparation of an impact statement, but such information may not be submitted by itself in place of an impact statement.

e. Section 69-6504 of the MEPA indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect.

The MEPA also indicates that adverse significant effects include those that degrade the quality of the environment, and curtail the range of beneficial uses of the environment, and serve short-term, to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if, on balance, the agency believes that the effect will be beneficial. Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.

6. CONTENT OF ENVIRONMENTAL STATEMENT

a. The following points are to be covered:

(1) A description of the proposed action including information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies and the public.

(2) The probable impact of the proposed action on the environment, including impact on ecological systems. Both primary and secondary significant consequences for the environment shall be included. A primary impact is one which generally results from a project input; a secondary impact is one which generally results from a project output. Primary impacts are usually more susceptible to measurement and analysis by an agency proposing an action because the primary impacts are more immediately related to an agency's area of responsibility and expertise. Secondary impacts, on the other hand, usually require analyses by a number of agencies because they are not within any single agency's area of responsibility or expertise.

(3) Any probable adverse environmental effects which cannot be avoided, should the proposal be implemented.

(4) Alternatives to the proposed action;
Section 69-6504 (b) (3) requires the responsible agency to "study develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." A rigorous exploration and objective evaluation

of alternative actions (including no action at all) that might avoid some or all of the adverse environmental effects is essential. In addition, there should be an equally rigorous consideration of alternatives open to other authorities. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.

(5) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(6) Any irreversible and irretrievable commitments of natural and economic resources which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent to which the action curtails the range of alternative and beneficial uses of the environment.

(7) A discussion of problems and objections raised by other agencies and by private organizations and individuals in the review process and the disposition of the issues involved. This section may be submitted separately from the draft.

(8) Insofar as it is practicable, a balancing of the economic benefits to be derived from a proposal with environmental costs.

(9) A listing of all agency personnel having chief responsibility for the preparation of the statement; a brief account of the formal education, training, and professional experience of such personnel; and a description of the sources of data, research or field investigation on which the statement and its conclusions are based.

b. Each environmental statement shall be prepared in accordance with the precept in Section 69-6504 (b) (1) that all agencies "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment."

c. Where an agency follows a practice of declining to favor an alternative until public hearings have been held on a proposed action, a draft environmental statement may be prepared and circulated, indicating that two or more alternatives are under consideration. Of necessity, this commits the agency to the preparation and circulation of a statement indicating its choice of a final alternative.

d. Agencies which are required to submit statements under Section 102 (2) (c) of the National Environmental Policy Act may, with EQC approval, substitute copies of that statement in lieu of the Section 69-6504 (b) (3) requirement of the MEPA.

e. Appendix I prescribes the form of the draft environmental statement.

7. STATE AGENCIES TO BE CONSULTED IN CONNECTION WITH PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS.

A state agency considering an action requiring an environmental statement for which it takes primary responsibility shall consult with and obtain the comment on the environmental impact of the action of state agencies or institutions with jurisdiction by law or special expertise with respect to any environmental impact involved.

In addition, any state agency responsible for a draft environmental statement may seek comment from appropriate federal and local agencies, from private individuals, organizations and institutions, and in particular from private parties whose interests are likely to be significantly affected by the proposed action.

Agencies seeking comment shall determine which one or more of the agencies or institutions are appropriate to consult on the basis of the areas of expertise. It is recommended that these agencies and institutions establish contact points for providing comments on the environmental statements and that departments from which comment is solicited coordinate and consolidate the comments of their component entities. It is further recommended that each agency establish a "fund file" of expertise available from the public and private sectors. The requirement in Section 69-6504 (b) (3) to obtain comment from state agencies having jurisdiction or special expertise is in addition to any specific statutory obligation of any state agency to coordinate or consult with any other agency. Agencies seeking comment shall establish time limits of not less than thirty (30) days for reply, after which it may be presumed, unless the agency consulted requires a specified extension of time, that the agency consulted has no comment to make. Agencies seeking comment should endeavor to comply with requests for extensions of time up to fifteen (15) days. Failure of EQC to publicly comment on any agency's environmental statement does not imply tacit approval of that agency action.

8. USE OF STATEMENTS IN AGENCY REVIEW PROCESSES: DISTRIBUTION TO ENVIRONMENTAL QUALITY COUNCIL: AVAILABILITY TO PUBLIC.

a. Agencies will need to identify at what state or stages of a series of actions relating to a particular matter the environmental statement procedures of these guidelines will be applied. It will often be necessary to use the procedures both in the development of a state program and in the review of proposed projects within the program. The principle to be applied is to obtain views of other agencies and the public at the earliest feasible time in the discussion and development of prog-

ram and project proposals. Care should be taken to avoid duplication but when action is considered which differs significantly from other actions already reviewed pursuant to Section 69-6504 (b) (3) of the MEPA, an environmental statement shall be provided.

b. Two (2) copies of draft environmental statements, and two (2) copies of the final text of environmental statements (if prepared) together with all comments received thereon by the responsible agency from all other agencies and from private organizations and individuals, shall be supplied to the office of the Executive Director of the Environmental Quality Council. It is important that draft environmental statements be prepared and circulated for comment and furnished to the Environmental Quality Council, the Governor, and the public at the earliest possible point in the agency review process in order to permit meaningful consideration of the environmental issues before an action is taken. It is not the intent of the MEPA that the environmental statement be written to justify decisions already made. No administrative action subject to Section 69-6504 (b) (3) shall be taken sooner than sixty (60) days after a draft environmental statement has been circulated for comment, furnished to the Council and except where advance public disclosure will result in significantly increased costs of procurement to the government, made available to the public pursuant to these guidelines. If the originating agency has a full and good faith consideration of the environment in its plans, and if this is reflected in favorable comments from review agencies and the public, the draft statement may be considered as satisfying the requirement of MEPA for a detailed statement. Agencies satisfying the requirement of MEPA with the draft statement must submit two (2) copies of all comments received thereon together with formal notification of the final decision on the proposed action. Agencies must furnish the same information (final decision and all comments on draft) to all commenting entities, whether public or private, as a logical termination to the process. In cases where the final environmental statement is required administrative action shall not be taken sooner than thirty (30) days after the final text has been made available to the Council and the public. If the final text of an environmental statement is filed within sixty (60) days after a draft statement has been circulated for comment, furnished to the Council and made public pursuant to this section of these guidelines, the thirty (30) day period and sixty (60) day period may run concurrently to the extent that they overlap.

c. With respect to recommendations or reports on proposals for legislation to which Section 69-6504 (b) (3) applies, a draft environmental statement may be furnished to the appropriate legislative committee and made available to the public pending transmittal of the comments as received and the final text, if required.

d. All agencies shall make available to the public all the reports, studies, and other documents that may and should underlie the draft and final impact statements and comments.

e. Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the agency proposing to take the action shall consult with the EQC about alternative arrangements. Similarly, where there are over-riding considerations of expense to the state or impaired program effectiveness, the responsible agency shall consult with the EQC concerning appropriate modifications of the minimum period.

f. In accord with the MEPA, agencies have an affirmative responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of agency plans and programs with environmental impact in order to obtain the view of interested and significantly affected parties.

These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information including information on alternative courses of action. Agencies which hold hearings on proposed administrative actions or legislation shall make the draft environmental statement available to the public at least thirty (30) days prior to the time of the relevant hearings. Hearings shall be preceded by adequate public notice and information to identify the issues and to obtain the comments provided for in the guidelines and should in all ways conform to those procedures outlined in the Montana Administrative Procedure Act, where applicable, R.C.M. 1947, 82-4201, et seq.

g. The agency which prepared the environmental statement is responsible for making the statement and the comments received available to the public, including inter-agency memoranda when such memoranda transmit comments of agencies upon the environmental impact of proposed actions subject to Section 69-6504 (b) (3).

h. Agency procedures prepared pursuant to Section 3 of these guidelines shall implement these public information requirements and shall include arrangements for availability of environmental statements and comments at the head and other appropriate offices of the responsible agency.

9. APPLICATION OF SECTIONS 69-6504 (b) (3) PROCEDURE TO EXISTING PROJECTS AND PROGRAMS.

The Section 69-6504 (b) (3) procedure shall be applied to major state actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the MEPA on March 9, 1971. Where an agency demonstrates that it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to

minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

10. SUPPLEMENTARY GUIDELINES, EVALUATION OF PROCEDURES.

These revised guidelines reflect the experience of pertinent State agencies and the EQC subsequent to the time the interim guidelines were issued almost a year ago. It is believed that this experience has made the guidelines more helpful and comprehensive. As more experience is gained, and as more comments are received, these guidelines will, from time to time, be further revised.

Agencies are encouraged to conduct an ongoing assessment of their experience in the implementation of the Section 69-6504 (b) (c) provisions of the MEPA and in conforming with these guidelines. The EQC will welcome comments on these areas at any time, but it would especially like to have such comments by December 31, 1972. Such comments should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on the environmental factors (and alternatives, wherever appropriate) of proposed actions without imposing unproductive administrative procedures.

APPENDIX I OF GUIDELINES

The environmental statement submitted to the Environmental Quality Council should cover the following items:

(Check one) ( ) Draft
( ) Final Environmental Statement

Name of responsible state agency (with name of operating division where appropriate.)

1. Name of action (Check one)
   ( ) Administrative Action
   ( ) Legislative Action

2. Description of action indicating what geographic area or political subdivision is particularly affected.

3. Environmental impact and adverse environmental effects.

4. List alternatives considered.

5. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

6. Any irreversible and irretrievable commitments of resources.

7. (a) (For draft statements) List all agencies from which comments have been requested.

   (b) (For final statements) List all agencies and sources from which written comments have been received.

8. Date draft statement and final statement was made available to the Governor, the Environmental Quality Council, and public.

Draft environmental statements should be concise, but in sufficient detail to allow a reviewer with appropriate expertise to grasp the essence of the action and comment intelligently.

In cases where final environmental statements are prepared, this format should be followed considering in detail the points covered in Section 6 of these guidelines.

ENVIRONMENTAL QUALITY COUNCIL
State Capitol Building
Helena, Montana

REVISED GUIDELINES FOR ENVIRONMENTAL IMPACT STATEMENTS REQUIRED BY THE MONTANA ENVIRONMENTAL POLICY ACT OF 1971 ADOPTED BY ENVIRONMENTAL QUALITY COUNCIL, SEPTEMBER 14, 1973

1. PURPOSE

The purpose of Section 69-6504(b)(3) of the Montana Environmental Policy Act (MEPA) and of these guidelines is to incorporate into the agency decision-making process careful and thorough consideration of the environmental effects of proposed actions, and to assist agencies in implementing MEPA in a uniform, deliberate and systematic manner.

2. POLICY

a. As early as possible and in all cases prior to any agency decision concerning major action or recommendation or a proposal for legislation that significantly affects the environment, State agencies shall, in consultation with other appropriate agencies and individuals, in both the public and private sectors, assess in detail the potential environmental impact in order that adverse effects are avoided and environmental quality is maintained, enhanced, or restored to the fullest extent practicable. In particular, it is especially important that alternative actions that will minimize adverse impacts shall be explored, and both the long and short range implications upon the human environment and upon nature shall be evaluated in order to avoid, to the fullest extent practicable, undesirable consequences for the environment as a whole.

The language in Section 69-6504 is intended to assure that all agencies of the State shall comply with the directives set out in said Section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

b. The term "human environment" shall be broadly construed to include not only social, economic, cultural, and aesthetic factors, but also, and particularly, the biophysical properties of natural ecosystems, including plants, humans, and other animals, their relationship to each other, and with all environmental components of air, water, and land.

3. AGENCY PROCEDURES

a. Each agency shall establish its own formal procedures for:
(1) Identifying those agency actions and decisions requiring environmental statements, the appropriate time prior to decision for the consultation required by Section 69-6504 (b)(3) and the agency review process for which environmental statements are to be available;

(2) Obtaining information required in the preparation of environmental statements;

(3) Designating the officials who are to be responsible for the environmental statements;

(4) Consulting with and taking account of the comments of appropriate agencies, private groups, and the public, whether or not an environmental statement is prepared;

(5) Preparing draft environmental statements.

(a). In accordance with the policy of MEPA, agencies have a responsibility to develop procedures to provide to the public timely information and explanation of plans and programs with environmental impact in order to obtain the views of any interested parties. Initial assessments of the environmental impacts of proposed action shall be undertaken concurrently with initial technical, energy use, and economic studies, and when required, a draft environmental impact statement shall be prepared and circulated for comments in time to accompany a proposal through the agency review process. During the process, agencies shall:

(1) Make provision for the circulation of draft statements to other appropriate agencies, selected private groups and individuals, and for their availability to the public. (Where an agency has an established practice of declining to favor an alternative until public comments on a proposed action have been received, the draft environmental statement may indicate that two or more alternatives are under consideration.);

(2) Give careful consideration to the comments elicited from the aforementioned sectors; and

(3) Issue final environmental impact statements which clearly evidence a responsiveness to such comments. The purpose of this assessment and consultation procedure is to provide agencies, other decision-makers, and the public with an understanding of the potential environmental effects of proposed actions.

Agencies should attempt to balance the results of their environmental assessments with their assessments of the net economic, technical, and other benefits of proposed actions, and use all practicable means to avoid or minimize undesirable consequences for the environment.

(b). If an agency relies on an applicant for the submission of initial environmental information, the agency shall assist the applicant by outlining the type and quality of information required. In all such cases, the agency must make its own determinations on the applicant's evaluation of the environmental issues and the agency must assume responsibility for the scope and content of draft and final environmental statements.

(6) Meeting the requirements of Section 69-6504(b)(3) for providing timely public information on plans and programs with environmental impact, including procedures responsive to Section 8 of these guidelines. These procedures should be consistent with the guidelines contained herein. Each agency should file a copy of all such procedures with the Environmental Quality Council (EQC) which will provide advice to agencies in the preparation of their procedures and guidance on the application and interpretation of the Council's guidelines.

In addition, it is suggested that each agency prepare a flow chart outlining its EIS procedure. The flow chart should include all points of review and decision-making, and divisions of individual responsibility. See sample attached as Appendix III.

4. STATE AGENCIES INCLUDED

Section 69-6504(b)(3) applies to all agencies of the State government. Each agency shall comply with the requirements unless the agency demonstrates that existing law applicable to its operations expressly prohibits or makes compliance impossible.

5. ACTIONS INCLUDED

The following criteria shall be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement.

a. Actions include, but are not limited to:

(1) Recommendations or favorable reports relating to legislation, including that for appropriations. The requirement for following Section 69-6504(b)(3) procedure as discussed in these guidelines applies to both:

(a). agency recommendations on their own proposals for legislation; and

(b). agency reports on legislation initiated elsewhere. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental impact statement.)

(2) Projects, programs, and continuing activities: directly undertaken by state agencies; supported in whole or in part through state funds or involving a state lease, permit, license, certificate or other entitlement for use;

(3) Policy, regulations, and procedure making.

b. The statutory clause "major actions of State government significantly affecting the quality of the human environment" shall be construed by agencies from the perspective of the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized and seemingly insignificant in their impact, but if there is a potential that the environment may be significantly affected, the statement shall be prepared.

In deciding what constitutes "major action significantly affecting the environment," agencies should consider that the effect of many State decisions about a project or a complex of projects can be individually limited but cumulatively considerable. By way of example, two suitable illustrations can be drawn: (1) one or more agencies, over a period of years, commits minor amounts of resources at any single instance, but the cumulative effect of those individually minor commitments amounts to a major commitment of resources, or (2) several government agencies individually make decisions regarding partial aspects of a major action. The guiding principle is that the whole can be greater than the sum of the parts. The lead agency shall prepare an environmental impact statement if it is foreseeable that a cumulatively significant impact on the environment will arise from State action. "Lead agency" refers to the State agency which has primary authority for committing the State government to a course of action with significant environmental impact. As necessary, the Environmental Quality Council will assist in resolving questions of lead agency determination.

Finally, the determination of what constitutes "major action significantly affecting the human environment" will unavoidably involve considerable judgment on the part of the responsible agency. To assist in that judgment, the following points should be general considerations (but not viewed as final determinants):

(1) Is the action under consideration the first or the only governmental decision to be taken on the proposal?

(2) Is the action decisive; could it substantially change the nature of the proposal, stop the proposal, or allow it to proceed to full implementation?

(3) Is the action expected to have direct statewide or regional implications?

(4) Is the action fixed for a certain period of time not to be modified except under new conditions not previously known, or conditions of an emergency nature?

(5) Does the action deal with environmental conditions (physical, social, biological) which have been clearly recognized as being endangered, fragile, or in severely short supply; or clearly approaching a precarious level of quality, hardship, or public safety?

(6) Is the action intended as environmentally regulatory or protective?

(7) Does the action involve considerable expenditure?

(8) Would environmental conditions be substantially altered in terms of size, quality, well-being, availability, or type of use?

(9) Would environmental conditions be affected over a large geographical area?

(10) Would environmental effects be beneficial, adverse or both?

(11) Would environmental effects be short-term, long-term, or permanent?

(12) Would environmental effects be reversible?

(13) Will the action involve a reasonably important "segment" of opinion in a controversy?

c. When an agency responsible for the issuance of a state lease, permit, license, certificate, or other entitlement for use, should be able to foresee that the issuance of a large number of such entitlements will, cumulatively, have a significant impact upon the environment, an environmental impact statement shall be prepared. Normal agency procedures, as delineated in Section 3 above, shall be used in the preparation of such an impact statement. Information supplied by applicants for these entitlements may be used or considered in the preparation of an impact statement, but such information may not be submitted by itself in place of an impact statement.

d. Section 69-6504 of the MEPA indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect. The MEPA also indicates that adverse significant effects include those that degrade the quality of the environment, and curtail the range of beneficial uses of the environment, and serve short-term, to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if, on balance, the agency believes that the effect will be beneficial. Significant adverse effects on the quality of the human environment include both those that directly affect human beings and

those that indirectly affect human beings through adverse effects on the environment.

6. CONTENT OF ENVIRONMENTAL STATEMENT

a. The following points are to be covered:

(1) A description of the proposed action including information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies and the public. The amount of detail provided in such descriptions should be commensurate with the extent and expected impact of the action, and with the amount of information required at the particular level of decision making (planning, feasibility, design, etc.).

(2) The probable impact of the proposed action on the environment, including impact on ecological systems. Both primary and secondary significant consequences for the environment shall be included. A primary impact is one which generally results from a project input; a secondary impact is one which generally results from a project output. Primary impacts are usually more susceptible to measurement and analysis by an agency proposing an action because the primary impacts are more immediately related to an agency's area of responsibility and expertise. Secondary impacts, on the other hand, usually require analyses by a number of agencies because they are not within any single agency's area of responsibility or expertise.

(3) Any probable adverse environmental effects which cannot be avoided, should the proposal be implemented. If there are adverse environmental effects which are unavoidable, mitigative measures shall be proposed to minimize such adverse environmental impact.

(4) Alternatives to the proposed action;

Section 69-6504(b)(4) requires the responsible agency to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." A rigorous exploration and objective evaluation of alternative action (including no action at all) that might avoid some or all of the adverse environmental effects is essential. In addition, there should be an equally rigorous consideration of alternatives open to other authorities. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.

(5) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(6) Any irreversible and irretrievable commitments of natural and economic resources (including energy resources) which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent to which the action curtails the range of alternative and beneficial uses of the environment.

(7) A discussion of problems and objections raised by other agencies and by private organizations and individuals in the review process where appropriate and the disposition of the issues involved.

(8) Insofar as it is practicable, a balancing of the economic benefits to be derived from a proposal with economic costs and environmental costs.

(9) Discussion of potential growth-inducing aspects of the proposed action.

(10) A listing of all agency personnel having chief responsibility for the preparation of the statement; a brief account of the formal education, training, and professional experience of such personnel; and a description of the sources of data, research or field investigation on which the statement and its conclusions are based.

b. Each environmental statement shall be prepared in accordance with the precept in Section 69-6504(b)(1) that all agencies "utilize a systematic, inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment."

c. Agencies which are required to submit statements under Section 102(2)(c) of the National Environmental Policy Act may, with EQC approval, substitute copies of that statement in lieu of the Section 69-6504(b)(3) requirement of the MEPA.

d. Appendix I prescribes the form of the draft environmental statement.

e. Appendix II suggests environmental values to be considered in connection with the preparation of impact statements.

7. STATE AGENCIES TO BE CONSULTED IN CONNECTION WITH PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

A state agency considering an action requiring an environmental statement for which it takes primary responsibility shall consult with and obtain the comment on the environmental impact of the action of state agencies or institutions with jurisdiction by law or special expertise with respect to any environmental impact involved.

In addition, any state agency responsible for a draft environmental statement may seek comment from appropriate federal and local agencies, from private individuals, organizations and institutions, and in particular from private parties whose interests are likely to be significantly affected by the proposed action.

Agencies seeking comment shall determine which one or more of the agencies or institutions are appropriate to consult on the basis of the areas of expertise. It is recommended that these agencies and institutions establish contact points for providing comments on the environmental statements and that departments from which comment is solicited coordinate and consolidate the comments of their component entities. It is further recommended that each agency establish a "fund file" of expertise available from the public and private sectors. The requirement in Section 69-6504(b)(3) to obtain comment from state agencies having jurisdiction or special expertise is in addition to any specific statutory obligation of any state agency to coordinate or consult with any other agency. Agencies seeking comment shall establish time limits of not less than thirty (30) days for reply, after which it may be presumed, unless the agency consulted requires a specified extension of time, that the agency consulted has no comment to make. Agencies seeking comment should endeavor to comply with requests for extensions of time up to fifteen (15) days. Failure of EQC to publicly comment on any agency's environmental statement does not imply tacit approval of that agency action.

8. USE OF STATEMENTS IN AGENCY REVIEW PROCESSES: DISTRIBUTION OF ENVIRONMENTAL QUALITY COUNCIL: AVAILABILITY TO PUBLIC

a. Agencies will need to identify at what state or stages of a series of actions relating to a particular matter the environmental statement procedures of these guidelines will be applied. It will often be necessary to use the procedures both in the development of a state program and in the review of proposed projects within the program. The principle to be applied is to obtain views of other agencies and the public at the earliest feasible time in the discussion and development of program and project proposals. Care should be taken to avoid duplication but when action is considered which differs significantly from other actions already reviewed pursuant to Section 69-6504(b)(3) of the MEPA, an environmental statement shall be provided.

b. Two (2) copies of draft environmental statements, and two (2) copies of the final text of environmental statements (if prepared) together with all comments received thereon by the responsible agency from all other agencies and from private organizations and individuals, shall be supplied to the office of the Executive Director of the Environmental Quality Council. It is important that draft environmental statements be prepared and circulated for comment and furnished to the Environmental Quality Council, the Governor, and the public at the earliest possible point in the agency review process in order to permit meaningful consideration of the environmental issues before an action is taken. It is not the intent of the MEPA that the environmental statement be written to justify decisions already made. No administrative action subject to Section 69-6504(b)(3) shall be taken sooner than sixty (60) days after a draft environmental statement has been circulated for comment, furnished to the Council and except where advance public disclosure will result in significantly increased costs of procurement to the government, made available to the public pursuant to these guidelines. If the originating agency has a full and good faith consideration of

the environment in its plans, and if this is reflected in favorable comments from review agencies and the public, the draft statement may be considered as satisfying the requirement of MEPA for a detailed statement. Agencies satisfying the requirement of MEPA with the draft statement must submit two (2) copies of all comments received thereon together with formal notification of the final decision on the proposed action. Agencies must furnish the same information (final decision and all comments on draft) to all commenting entities, whether public or private, as a logical termination to the process. In cases where the final environmental statement is required administrative action shall not be taken sooner than thirty (30) days after the final text has been made available to the Council and the public. If the final text of an environmental statement is filed withint sixty (60) days after a draft statement has been circulated for comment, furnished to the Council and made public pursuant to this section of these guidelines, the thirty (30) day period and sixty (60) day period may run concurrently to the extent that they overlap.

In those instances where an agency has, after careful consideration, concluded that a proposed action or project does not require the preparation of a final environmental impact statement, the EQC, through the office of the Executive Director, may, upon request from the agency, remove any further time restrictions for the implementation of such agency actions or projects.

c. With respect to recommendations or reports on proposals for legislation to which Section 69-6504(b)(3) applies, a draft environmental statement may be furnished to the appropriate legislative committee and made available to the public pending transmittal of the comments as received and the final text, if required.

d. All agencies shall make available to the public all the reports, studies, and other documents that may and should underlie the draft and final impact statements and comments.

e. Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the agency proposing to take the action shall consult with the EQC about alternative arrangements. It is important that the agency provide the EQC with a precise, factual statement detailing the nature of the emergency, and the reasons the agency feels it must depart from normal procedural requirements. Similarly, where there are over-riding considerations of expense to the state or impaired program effectiveness, the responsible agency shall consult with the EQC concerning appropriate modifications of the minimum period.

f. In accord with the MEPA, agencies have an affirmative responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of agency plans and programs with environmental impact in order to obtain the view of interested and significantly affected parties.

These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (i) the magnitude of the proposal in terms of economic costs, the geographic area involved, the uniqueness or size of commitment of resources involved, and the amount and types of energy required; (ii) the degree of interest in the proposal, as evidenced by requests from public and from State and local authorities that a hearing be held; (iii) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and (iv) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action. Agencies which hold hearings on proposed administrative actions or legislation shall make the environmental statement available to the public at least thirty (30) days prior to the time of the relevant hearings. Hearings shall be preceded by adequate public notice and information to identify the issues and to obtain the comments provided for in the guidelines and should in all ways conform to those procedures outlined in the Montana Administrative Procedure Act, where applicable, R.C.M. 1947, 82-4201, et. seq.

g. The agency which prepared the environmental statement is responsible for making the statement and the comments received available to the public, including inter-agency memoranda when such memoranda transmit comments of agencies upon the environmental impact of proposed actions subject to Section 69-6504(b)(3).

h. Agency procedures prepared pursuant to Section 3 of these guidelines shall implement these public information requirements and shall include arrangements for availability of environmental statements and comments at the head and other appropriate offices of the responsible agency.

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The Section 69-6504(b)(3) procedure shall be applied to major state actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the MEPA on March 9, 1971. Where an agency demonstrates that it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

10. SUPPLEMENTARY GUIDELINES, EVALUATION OF PROCEDURES

These revised guidelines reflect the experience of pertinent state agencies and the EQC subsequent to the time the interim guidelines

were issued. It is believed that this experience has made the guidelines more helpful and comprehensive. As more experience is gained, and as more comments are received, these guidelines will, from time to time, be further revised.

Agencies are encouraged to conduct an ongoing assessment of their experience in the implementation of the Section 69-6504(b)(3) provisions of the MEPA and in conforming to these guidelines. The EQC will welcome comments on these areas at any time, but it would especially like to have such comments by December 31, 1973. Such comments should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on the environmental factors (and alternatives, wherever appropriate) of proposed actions without imposing unproductive administrative procedures.

APPENDIX I

The environment statement submitted to the Environmental Quality Council should cover the following items:

(Check one) ( ) Draft ( ) Final Environmental Statement

Name of responsible state agency (with name of operating division where appropriate).

Name of action (Check one) ( ) Administrative Action
( ) Legislative Action

1. Description of action indicating what geographic area or political subdivision is particularly affected.

2. Environmental impact.

3. Adverse environmental effects.

4. List alternatives considered.

5. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

6. Any irreversible and irretrievable commitments of resources.

7. (a) (For draft statements) List all agencies from which comments have been requested.

   (b) (For final statements) List all agencies and sources from which written comments have been received. Discussion of comments and disposition of issues involved.

8. Balance of economic benefits with economic costs and environmental costs.

9. Potential growth-inducing effects.

10. List all agency personnel having chief responsibility for the preparation of the statement; a brief account of the formal education, training, and professional experience of such personnel; and a description of the sources of data, research or field investigation on which the statement and its conclusions are based.

11. Date draft statement and final statement was made available to the Governor, the Environmental Quality Council, and public.

Draft environmental statements should be concise, but in sufficient detail to allow a reviewer with appropriate expertise to grasp the essence of the action and comment intelligently.

In cases where final environmental statements are prepared, this format should be followed considering in detail the points covered in Section 6 of these guidelines.

APPENDIX II

By way of suggestion, but, by no means, by way of limitation, the following are some specific values that could be affected by almost every agency action or program:

TERRESTRIAL AND AQUATIC LIFE

WATER QUALITY, QUANTITY AND DISTRIBUTION

THE TERRESTRIAL AND AQUATIC HABITAT

AESTHETICS AND NATURAL BEAUTY

SOIL QUALITY, STABILITY AND MOISTURE

WILDERNESS VALUES

HUMAN PRESSURES ON RESOURCES

LOCAL AND STATE TAX BASE CONSIDERATIONS

TRANSPORTATION REQUIREMENTS

LAW ENFORCEMENT AND EFFECTIVENESS

DISTRIBUTION AND DENSITY OF PEOPLE

ECONOMIC CONSIDERATIONS (BUSINESS, INDUSTRY, DOLLAR TURNOVER AND EMPLOYMENT)

FOOD AND FIBER PRODUCTION

RECREATIONAL OPPORTUNITIES AND QUALITY OF RECREATIONAL EXPERIENCES

INCREASED SUBURBANIZATION, OR URBANIZATION, OR LAKE AND STREAM-SIDE DEVELOPMENT

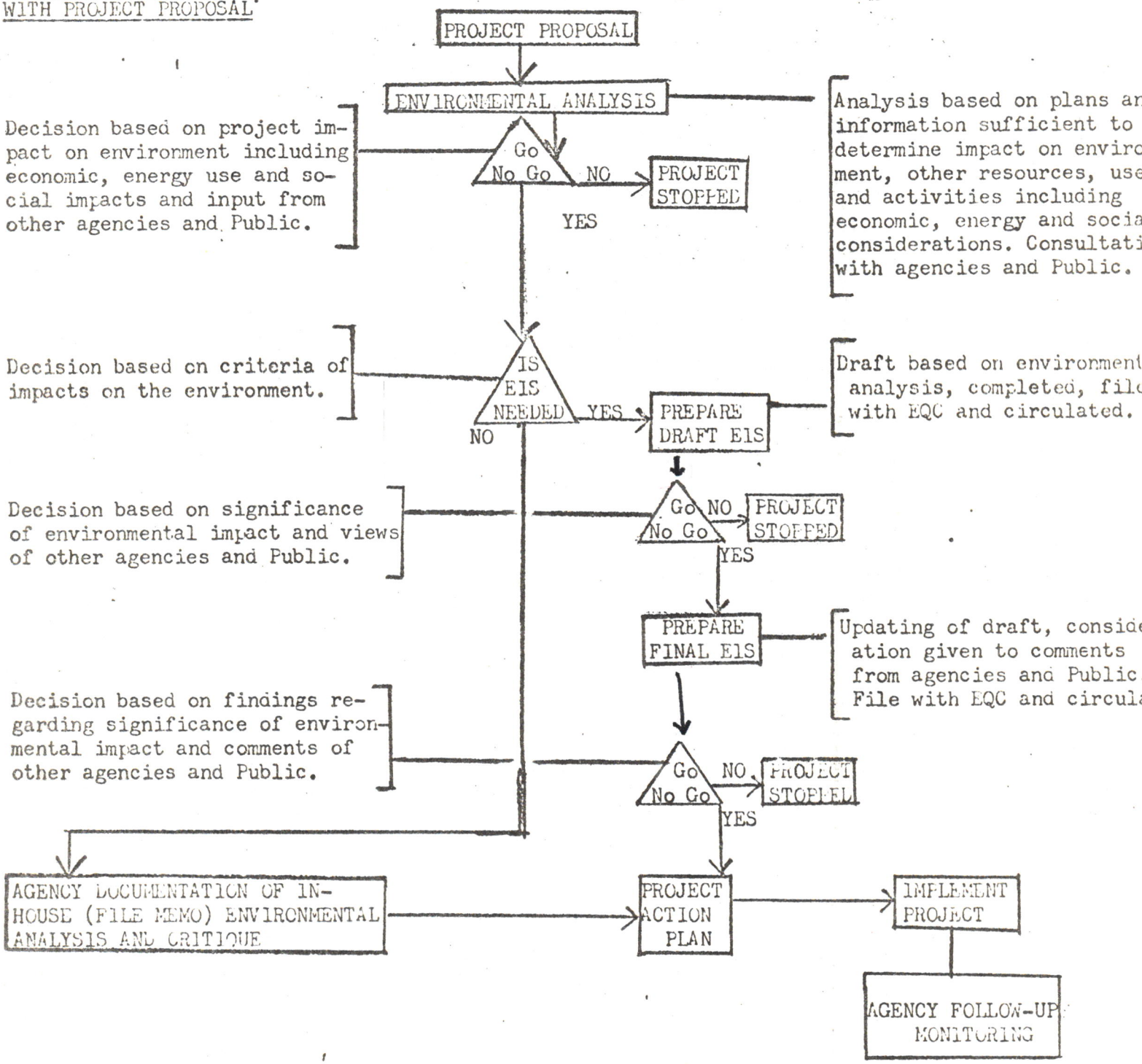
NOISE POLLUTION AND TRANQUILITY, AND ANY OTHER PERTINENT SOCIAL CONSIDERATIONS

HISTORIC AND ARCHEOLOGICAL SITES AND UNIQUE AND NATURAL AREAS

CULTURAL UNIQUENESS AND DIVERSITY

APPENDIX III

SAMPLE FLOW CHART FOR AGENCY USE IN INCORPORATING SECTION 69-6504 OF THE MONTANA ENVIRONMENTAL POLICY ACT INTO DECISION MAKING FOR ALL MAJOR PROGRAMS



STATE OF MONTANA

APPENDIX "C"

Office of the Governor

EXECUTIVE ORDER 4-75

Executive Order creating a Commission on Environmental Quality to promulgate rules under the Montana Environmental Policy Act.

Section 69-6504, R.C.M. 1947, of the Montana Environmental Policy Act directs the agencies of state government to prepare environmental impact statements analyzing the economic, social, and environmental impacts of major state actions that will have a significant impact on the environment. A recent First Judicial District Court opinion in the case of The Montana Wilderness Association, Inc., v. Board of Land Commissioners reaffirms the mandate of the Montana Environmental Policy Act and emphasizes that the Executive Branch agencies are responsible for adopting rules to implement MEPA.

THEREFORE, I, THOMAS L. JUDGE, Governor of the State of Montana, do hereby create a Commission on Environmental Quality to promulgate uniform rules for implementation of the Montana Environmental Policy Act. The members of the Commission shall be Gary Wicks, Dr. John Anderson, Ted Schwinden, Wes Woodgerd, and Steve Brown, who shall serve as Chairman. I direct the Commission to work with the Environmental Quality Council, the other agencies of the Executive Branch and the public in promulgating uniform rules for adoption under the Montana Administrative Procedure Act. I also charge the Commission with the continuing responsibility of evaluating and making recommendations for changes in the rules implementing the Montana Environmental Policy Act.

GIVEN under my hand and the GREAT SEAL of the State of Montana this 30th day of April in the year of our LORD, One Thousand Nine Hundred and Seventy-five.

Thos. L. Judge

THOMAS L. JUDGE, Governor of the State of Montana

ATTEST:

Frank Murray

Secretary of State

ENVIRONMENTAL QUALITY COUNCIL
Montana State Legislature
Capitol Station
Helena, Montana

APPENDIX "D"

UNIFORM RULES FOR ENVIRONMENTAL IMPACT STATEMENTS IMPLEMENTING THE MONTANA ENVIRONMENTAL POLICY ACT OF 1971 ADOPTED BY ENVIRONMENTAL QUALITY COUNCIL, MAY 29, 1975

Section

I. INTRODUCTION AND POLICY (1) The legislature in 1971 adopted the Montana Environmental Policy Act (Sections 69-6501 through 69-6517, Revised Codes of Montana, 1947). The Act declares a state policy to achieve and maintain environmental quality and provides a general procedural framework for state agency decision making that will give appropriate consideration to environmental values.

(2) Section 69-6504 directs that all agencies of the state shall:

"(1) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment;

(2) identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

(3) Section 69-6503 of the Act "declares that it is the continuing policy of the state of Montana...to use all practicable means and measures... in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which men and nature can coexist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Montanans."

(4) Anticipating the impacts of proposals and alternatives is a necessary tool that must be utilized by all agencies of the state so that the state may "fulfill the responsibilities of each generation as the trustee of the environment for succeeding generations," according to Section 69-6503(a)(1). Section 69-6504(b)(1) states that these efforts must "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment."

(5) As early as possible and in all cases prior to any agency decision concerning major action or recommendation on a proposal for legislation that significantly affects the environment, state agencies shall, in consultation with other appropriate agencies and individuals, in both the public and private sectors, assess in detail the potential environmental impact so that adverse effects are avoided and environmental quality is maintained, enhanced, or restored to the fullest extent practicable. In particular, it is especially important that alternative actions that will minimize adverse impacts be explored, and both the long and short range effects on the human environment and on nature be evaluated in order to avoid, to the fullest extent practicable, undesirable consequences for the environment as a whole.

(6) The language in Section 69-6504 is intended to insure that all agencies of the state shall comply with the directives set out in that section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. In deciding whether or not to approve the action under consideration, the agency should consider the broad range of environmental factors covered by the environmental impact statement in addition to the specific factors indicated by the statute or regulation authorizing the agency action.

II. DEFINITIONS (1) "Agency of the state" means any agency of state government as defined in Title 82A, R.C.M., 1947.

(2) "Agency listing" is a listing of all state agencies with environmental expertise or jurisdiction compiled by the Environmental Quality Council and the Commission on Environmental Quality. The listing will indicate the areas of environmental expertise and jurisdiction of each agency, and will be distributed to assist agencies in conducting preliminary environmental reviews and preparing draft environmental impact statements, and in determining whether a joint impact statement is appropriate.

(3) "Emergency actions" are:

(a) projects undertaken, carried out, or approved by an agency to maintain, repair, or restore property or facilities damaged or destroyed as a result of disaster in a disaster-stricken area in which a state of emergency has been declared by the governor or other appropriate government official;

(b) emergency repairs to public service facilities necessary to maintain service;

(c) projects undertaken as emergency action necessary to prevent or mitigate immediate threats to public health or safety.

(4) "Major actions of state government" include, but are not limited to:

(a) Facilities development; planning, designing, or constructing physical facilities to be owned and operated by state agencies.

(b) Rule making; development and promulgation of rules and standards.

(c) Policy making; development and formal recommendation of state policy.

(d) Legislation; agency recommendations or formal reports relating to legislation, including appropriations. This includes agency recommendations on their own proposals, and agency reports on proposals initiated elsewhere. In the latter case, only the agency which has primary responsibility for the subject matter involved will be required to conduct an environmental review.

(e) Individual projects; the development of state programs, proposed projects within state programs, and continuing activities undertaken by state agencies and supported in whole or in part by state funds or involving a state lease, permit, license, certificate, or other entitlement.

(f) any agency action for which a hearing is normally required by statute or regulation.

(g) any agency action having one or more of the following characteristics:

(i) The action under consideration is the first or only governmental decision to be taken on the project;

(ii) The action may generate additional or secondary impacts which outweigh the initial impacts;

(iii) The action is expected to have direct or indirect local, statewide, or regional implications;

(iv) The action may affect environmental attributes recognized as being endangered, fragile, or in severely short supply;

(v) The action is growth-inducing;

(vi) The action may substantially alter environmental conditions in terms of quality or availability;

(vii) The action may have irreversible environmental effects;

(viii) The action is likely to be precedent setting or controversial;

(ix) The action is one of a number of smaller actions which have a substantial impact collectively.

(5) "Major actions of state government" do not include, and an environmental review is not necessary for, agency actions which are not included in paragraphs (4)(a) through (4)(f) of this section, and which have none of the characteristics listed in paragraph (4)(g), and which fall into one of the following categories:

(a) Ministerial actions; actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner pursuant to statutory or regulatory mandate. In such actions, the responsible official must act without regard to his own judgment or opinion as to the wisdom or propriety of the action. Such actions are in the nature of routine, clerical or similar actions.

(b) Existing facilities; minor repairs, operation or maintenance

of existing equipment or facilities involving no expansion of capacity or use beyond that already existing. Such actions might include interior alteration or repair of buildings, installation of safety or health protection devices, minor highway maintenance or repair.

(c) Investigation and enforcement; data collection, inspection of facilities, enforcement of environmental standards.

(6) "Human environment" is broadly construed to include the biophysical, social, economic, cultural, and aesthetic factors that interrelate to form the environment in which Montanans live.

(7) "Lead agency" is the agency of the state that has primary authority for committing the government to a course of action with significant environmental impact, or the agency chosen to supervise the preparation of a joint environmental impact statement where more than one agency is involved in the action. The Environmental Quality Council and the Commission on Environmental Quality will assist, on request, in resolving questions of lead agency determination.

(8) "Environmental impact statement" is the "detailed statement" required by Section 69-6504(b)(3), and can take several different forms:

(a) "Draft environmental impact statement" is the initial environmental impact statement prepared in accordance with section IV.(2) of these rules, and distributed to the appropriate agencies and the public for comment prior to filing the final environmental impact statement.

(b) "Final environmental impact statement" is a document summarizing or if necessary including the major conclusions and supporting information of a draft environmental impact statement and specifically including the lead agency's response to all substantial comments or objections raised by the public or other agencies since issuance of the draft environmental impact statement.

(c) "Joint environmental impact statement" is an environmental impact statement prepared by more than one agency in cooperation when such agencies are involved in the same or closely related proposed actions.

(d) "Programmatic environmental impact statement" is an environmental impact statement covering several related actions, or discussing initiation or continuance of a broad policy or program which may involve a series of future actions.

(9) "Agency impact determination" is the report or recommendation by an agency, after completion of the preliminary environmental review, that serves public notice of the results of the preliminary environmental review. Specifically, the agency impact determination announces the determination whether the proposed action will or might significantly affect the quality of the human environment. A determination in the negative serves to announce that a draft environmental impact statement will not be prepared. A determination in the affirmative announces that a draft environmental impact statement will be prepared and serves the additional function of notifying agencies and individuals who have an interest in the forthcoming draft environmental impact statement.

(10) "Preliminary environmental review" (PER) is the initial review of a proposed action to determine whether the action might significantly affect the quality of the human environment and therefore require a draft environmental impact statement. Report of the completed PER is an agency impact determination.

III. PRELIMINARY ENVIRONMENTAL REVIEW (PER) CHECKLIST. Once an action is identified as not categorically exempt from environmental

review requirements, a preliminary environmental review (PER) must be conducted to determine if the action will have a significant effect on the environment and therefore require a detailed impact statement. The PER is to be conducted concurrently with preliminary economic, technical and other review procedures which normally go into the agency review process. In order to facilitate this review, a checklist is to be developed.

(1) Development of PER Checklist:

(a) Each agency shall identify those actions typically undertaken by the agency which do not require an environmental review, in accordance with section II(5). No category of action may be formally designated as exempt from the requirements of the Montana Environmental Policy Act except pursuant to the rule making procedures of the Montana Administrative Procedures Act, Section 82-4201 et seq., R.C.M., 1947.

(b) Each agency shall identify the types of actions which it typically undertakes which require environmental review.

(c) For each type of action identified in paragraph (b), the agency shall identify the environmental considerations usually involved in that type of action (e.g. SO_2 emissions, water pollutant discharges, etc.)

(d) For each such environmental consideration, the agency shall identify the type of information or data which must be obtained in order to determine the extent of the impact which the action will have on the environment.

(e) Based on the information gathered pursuant to paragraphs (b) through (d), the agency shall prepare a checklist format for conducting the PER. The agency may develop one general checklist which applies to all its actions, or it may develop a separate format for each of its major types of actions.

(f) The checklist shall include, at a minimum:

(i) an adequate description of the proposed action, including maps and graphs if appropriate;

(ii) a listing and brief description of alternative actions;

(iii) a listing of other agencies or groups that may have been contacted, or which may have overlapping jurisdiction; a summary of the comments or information obtained from such agencies or groups;

(iv) an evaluation section which consists of specific questions which must be considered. These questions shall reflect the criteria for defining "significant effect on the quality of the human environment," set out in section III(2) of these rules, infra.

(v) a recommendation by the responsible official whether an environmental impact statement is required;

(vi) identification of the person or persons conducting the PER.

(g) Agencies shall submit their proposed checklist formats for comment and critique to the Environmental Quality Council, the Commission on Environmental Quality, and to other agencies with relevant expertise or jurisdiction, and shall revise their formats where appropriate in accordance with the comments received.

(h) Each agency shall submit a list of activity categories and associated areas of environmental jurisdiction and concern to the Environmental Quality Council and the Commission of Environmental Quality for use in compiling an agency listing.

(i) Each agency shall designate and identify an official or officials who are responsible for the content and preparation of prelimi-

nary environmental reviews and draft environmental impact statements, coordinating impact statement investigatory research with other agencies, and establishing a "fund file" of available expertise from the public and private sectors.

(2) Evaluation of Significance of Impact on the Environment: The determination of whether an agency action will have a significant effect on the quality of the human environment necessarily involves careful judgment on the part of the responsible agency officials.

(a) The PER checklist must consider the effect of the proposed action on the following factors, where appropriate:

(i) Terrestrial and aquatic life and habitats;
(ii) Water quality, quantity, and distribution;
(iii) Soil quality, stability, and moisture;
(iv) Vegetation cover, quantity, and quality;
(v) Natural beauty and aesthetics;
(vi) Access to and quality of recreational and wilderness experiences;
(vii) Historical and archeological sites;
(viii) Unique, endangered, fragile, or limited environmental resources;
(ix) Air quality;
(x) Social structures and mores;
(xi) Cultural uniqueness and diversity;
(xii) Local and state tax base and tax revenues;
(xiii) Agricultural production;
(xiv) Demands on environmental resources of land, water, air, and energy;
(xv) Quantity and distribution of community and personal income;
(xvi) Human health;
(xvii) Transportation networks; traffic flows;
(xviii) Quantity and distribution of employment;
(xix) Distribution and density of population and housing;
(xx) Demands for government services, i.e. water, waste disposal, schools, police, fire, health, streets;
(xxi) Industrial and commercial activity;

(b) In addition, the evaluation section of the PER checklist shall address the following questions:

(i) Would the proposed action conflict with any environmental plans or goals that have been adopted by the community where the project is to be located?

(ii) Would the action substantially affect rare or endangered animal or plant species, or the habitat of such a species?

(iii) Would the project breach any state, national, or local standards relating to solid waste or litter control?

(iv) Might the project cause substantial flooding, erosion, or siltation?

(v) Are there substantial differences of opinion among experts or affected citizens as to the extent of adverse impacts on the human environment?

(c) The possibility of a significant effect on any of the factors listed in subsection(2)(a), or a "yes" answer to any of the questions in subsection(2)(b) indicates that a detailed environmental impact statement is required. The lists in subsections(2)(a) and (2)(b) are not necessarily exhaustive, but indicate the range of considerations which must be addressed during the PER. In addition, the following factors will influence the weight to be assigned to the impacts of a proposed action:

(i) The significance of an action may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural setting.

(ii) Primary and secondary effects must be considered. Secondary, or indirect, effects such as residential or commercial expansion encouraged by highway or sewer construction, often may have more significant environmental impacts than the project itself.

(iii) The significance of an action may depend on its relationship to other agency decisions. If the action is the first or only state agency decision to be made on the project, it is likely to be more significant than if other decisions must be made which do not depend on the outcome of the present decision.

(iv) The statutory clause "major actions of state government significantly affecting the quality of the human environment" shall be construed by agencies from the perspective of the overall impact of the action proposed and the cumulative impacts of further actions contemplated. Such actions may be localized and seemingly insignificant in their individual impacts, but if there is a potential that the environment may be significantly affected as the actions accumulate, the environmental impact statement shall be prepared.

(v) When an agency responsible for the issuance of a lease, permit, license, certificate, or other entitlement can foresee that the issuance of a large number of such entitlements will, cumulatively, have a significant impact on the environment, a programmatic environmental impact statement should be prepared which addresses these cumulative impacts.

(vi) In any situation where cumulative impacts of a series of related actions may be significant, the agency should consider the appropriateness of preparing a programmatic impact state, as described in Section IV(2)(e).

IV. ENVIRONMENTAL REVIEW PROCEDURES. To guide environmental review of proposed actions, agencies shall adopt the following procedures:

(1) Preliminary Environmental Review (PER). Concurrent with preliminary technical, economic and other review procedures which normally go into the agency review process, the agency shall conduct a preliminary environmental review sufficient to make a determination whether the action may have a significant effect on the human environment. The evaluation should be explicit enough to make clear to other agencies and the public the basis for the agency's recommendation whether to prepare an environmental impact statement. In conducting a PER, the agency shall procede as follows:

(a) determine whether the proposed action is a major action as defined in section II(4) and as identified in section III(1) of these rules;

(b) if the proposed action is not a major action, no further environmental review is necessary;

(c) if the proposed action is an emergency action as defined in Section II(3) of these rules, the agency may procede with the action immediately, as the emergency dictates. In this case, however, the agency shall continue with the environmental review procedures concurrent with or subsequent to the action, in order to inform other agencies and the public of the environmental impacts caused by the action.

(d) if the proposed action is a major action, fill out the appropriate PER checklist to determine whether the action would have a significant effect on the human environment;

(e) in filling out the PER checklist, the agency may utilize information submitted to it by the applicant. The agency must take responsibility for the accuracy and adequacy of the information used to determine the extent of environmental impact;

(f) the agency may consult with other agencies or groups in conducting the PER and filling out the checklist. Where the agency listing indicates other agencies with relevant expertise or overlapping jurisdiction, such consultation is required;

(g) after completing the PER, the agency shall circulate the checklist to all agencies with relevant expertise and jurisdiction, and to the Environmental Quality Council and Commission on Environmental Quality, and to any individuals or groups which have been identified as interested in or affected by the proposed action. All such agencies and groups will have fifteen (15) days to submit comments to the agency. The agency will take no action towards approval of the proposed action during that period;

(h) commenting agencies should indicate the need for a joint or programmatic impact statement where appropriate. Where a joint statement is necessary, the agencies involved shall confer to determine the lead agency, or shall make plans to coordinate preparation of a joint statement;

(i) if the agency's completed checklist indicates there will be no significant effect on the human environment, the checklist will serve as an agency impact determination and the agency's normal decision making process with respect to the proposed action may continue;

(j) if the agency's completed checklist indicates there will or may be a significant effect on the human environment, the checklist will serve as an agency impact determination giving notice of intent to prepare an environmental impact statement. The agency shall then procede to prepare a draft environmental impact statement. Until the environmental impact statement procedure is completed, the agency will take no further action towards approval of the proposed action;

(k) agencies shall maintain a listing of all agency impact determinations. This listing shall be available to the public.

(2) Preparation of Draft Environmental Impact Statements.

(a) Once it has been determined that an environmental impact statement is required, the agency shall, at the earliest feasible time, consult with other agencies with relevant expertise or jurisdiction with respect to the contemplated action and its impacts. The agency should also seek comments from appropriate federal and local agencies, public and private organizations, groups, and individuals whose interests are likely to be significantly affected by the action. In order to facilitate this consultation process, agencies should develop "fund files" of expertise available from the public and private sectors. This consultation need not be considered formal. An interdisciplinary approach to the preparation of draft environmental impact statements is the chief goal of agency consultation.

(b) Where the lead agency or another state or federal agency has already prepared an environmental impact statement on a project which is related geographically or functionally to the project under consideration, portions of such an environmental impact statement may be utilized by the agency. The agency must be careful to insure that all conditions and impacts peculiar to the action under consideration are adequately dealt with. The Environmental Quality Council will assist agencies, on request, in determining whether such related impact statements are available.

(c) Fees. Under Section 69-6518 of the Act, in any action involving an application for a lease, permit, license, certificate or other entitlement, the agency should determine, after the initial consultations with other agencies, whether the expected cost of preparing a draft and final environmental impact statement will exceed two thousand five hundred dollars ($2,500.00). If this is the case, the agency may require the applicant to pay a fee to cover such costs, up to two percent (2%) of the total projected cost of the proposed project. The agency may adopt rules to determine how such fees will be assessed.

(d) Joint Impact Statements. Where more than one agency (including federal agencies) directly sponsors an action, or is directly involved in an action through funding, licensing, or permits; or where more than one agency is involved in a group of actions directly related to each other because of their functional interdependence and geographical proximity, consideration should be given to preparation of one environmental impact statement for all the state actions involved. Agencies in such cases should consider the possibility of joint preparation of an environmental impact statement by all agencies involved, or designation of a single lead agency to assume supervisory responsibility over the preparation of the environmental impact statement. Where a lead agency prepares the statement, the other agencies involved should provide assistance with respect to their areas of jurisdiction and expertise. In either case, the environmental impact statement should assess the total impact of the full range of state actions involved, should reflect the views of all participating agencies, and should be prepared before major or irreversible actions have been taken by any of the participating agencies. Factors relevant in determining an appropriate lead agency include the time sequence in which agencies become involved, the magnitude of their respective involvements, and their relative expertise with respect to the project's environmental effects.

(e) Programmatic Impact Statements. Where the cumulative effects of several related actions are significant, a programmatic impact statement may be appropriate. Individual actions that are related either geographically (e.g. several proposed subdivisions within a particular area), or as logical parts within a contemplated series of actions (e.g. several segments of a proposed highway) may be more appropriately evaluated in a single programmatic statement. Such a programmatic statement may also be appropriate in the development of rules or policies or other criteria which will govern the conduct of a continuing program, or in the development of a new program that contemplates a number of subsequent actions.

A programmatic statement will not satisfy the requirements of the Act if it is superficial or limited to generalities. The programmatic statement should satisfy all the requirements for the content of individual project statements, but should emphasize cumulative impacts, and alternative policies or courses of action.

The programmatic statement will serve as an analytical foundation for subsequent individual project statements, but subsequent individual projects may require further analysis where conditions or expected impacts have changed, or where specific impacts peculiar to the individual project were not treated in sufficient detail in the programmatic statement. Where appropriate, subsequent individual project statements may take the form of addenda to programmatic statements already issued.

(f) On request, the Environmental Quality Council will advise agencies concerning the appropriateness of joint or programmatic statements, and will assist in the determination of lead agency.

(3) Distribution of the Draft EIS--Comment Procedures.

(a) One copy of the draft environmental impact statement shall be transmitted to the office of the executive director of the Environmental Quality Council. The lead agency shall also circulate the draft environmental impact statement to other appropriate agencies and selected public and private groups and individuals, including, at a minimum, those parties who have already supplied information and comments to the agency on the proposed action. The listed transmittal date to the Environmental Quality Council shall not be earlier than the date of the draft environmental impact statement mailing to the other agencies, organizations, and individuals. Agencies seeking comments shall establish time limits of not less than thirty (30) days for reply, after which it may be presumed, unless the commenting agency requests an extension of time not to exceed fifteen (15) days, that the agency consulted has no comment to make. All agencies shall make available for public inspection all reports, studies, and other documents that underlie the draft and final environmental impact statements.

(b) At this point, lead agencies may decide to hold a public hearing on the draft environmental impact statement. In deciding whether a public hearing is appropriate, the agency should consider:

(i) the magnitude of the proposal in terms of foreclosing future options; geographic area involved; irreversible commitment of resources; the amount and types of energy required; the uniqueness of the required resources;

(ii) the degree of interest in the action partly evidenced by requests for a hearing from the public and from state and local authorities;

(iii) the complexity and potential precedent-setting aspects of the proposed action and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act.

(c) Agencies which hold hearings shall mail or otherwise transmit the draft environmental impact statement to interested parties at least twenty (20) days prior to the time of the hearings. Hearings shall be preceded by adequate public notice.

(d) If an agency action for which a draft environmental impact statement has been prepared normally requires a public hearing, the draft environmental impact statement should be prepared and transmitted at least twenty (20) days in advance of such hearing.

(e) No action subject to Section 69-6504(b)(3) of the Act shall be taken sooner than sixty (60) days after the transmittal date to the Environmental Quality Council of the draft environmental impact statement.

(f) If the lead agency has given full and good faith consideration to the environment in its plans, if this is reflected in favorable comments from reviewers, and if the draft environmental impact statement represents the fullest possible compliance with the Act, the draft environmental impact statement may be seen as satisfying the requirement for a detailed statement. If the draft environmental impact statement is sufficient, the lead agency must submit to the Environmental Quality

Council one copy of all comments received on the draft environmental impact statement and at public hearings, together with agency responses to comments, and formal notification of the final agency decision on the proposed action. Lead agencies must furnish the same information to all commenting parties.

(g) The lead agency shall determine, taking into account all comments received on the draft environmental impact statement or at public hearings, whether a final environmental impact statement is required for compliance to the fullest extent possible with the Act.

(4) Final Environmental Impact Statement

(a) A final environmental impact statement shall include, at minimum:

(i) a summary of major conclusions and supporting information based on the draft environmental impact statement and on agency responses to comments received on the draft environmental impact statement, stating specifically where such conclusions and information were changed from those which appeared in the draft.

(ii) a list of all sources of written and oral comments, including those obtained at public hearings, and unless impractical, shall include the text of comments received by the agency. In all cases, the text of a representative sample of comments shall be included.

(iii) agency responses to these comments. These responses shall include a good faith evaluation of the comments received, and a substantive disposition of the issues involved.

(iv) new data, information, and explanations derived or obtained subsequent to circulation of the draft.

(b) No agency action shall be taken towards approval of the proposed project sooner than thirty (30) days after the final environmental impact statement has been transmitted to the Environmental Quality Council and concerned parties. The listed transmittal date to the Environmental Quality Council shall not be earlier than the date of the final environmental impact statement mailing to other appropriate agencies, organizations, and individuals.

(c) Where emergency circumstances or conflicting statutory requirements make it necessary, the lead agency may take an action having significant environmental impacts without observing the provisions of these regulations concerning time requirements for agency review and advance availability of environmental impact statements. The lead agency shall provide the Environmental Quality Council with a precise, factual statement detailing the nature of the emergency or statutory conflict, and the reasons for departing from normal procedures.

(d) Draft and final environmental impact statements must state the source material used in preparation of the impact statement, and identify the persons contributing to the impact statement.

V. CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS. Each environmental impact statement shall be prepared in accordance with the precept in Section 69-6504(b)(1) of the Act that all agencies shall "utilize a systematic, interdisciplinary approach...in planning and decision making..." In addition, the Act should be seen as a "full disclosure" law. This means that environmental impact statements must describe all environmental impacts of a proposed action, even where the impacts are beyond the control or realm of expertise of the lead agency. It must be remembered

that the environmental impact statement will be used as a source of information not only for the lead agency's decision makers, but also for other agencies and for the public.

The cover of the environmental impact statement should include, at a minimum, the name of the lead agency (with the name of the operating division, where appropriate), whether the statement is a draft or a final, and the date of transmittal to the Environmental Quality Council.

Environmental impact statements should cover the following:

(1) a description of the nature and objectives of the proposed action;

(2) a description of current environmental conditions in the area affected by the action, including maps and charts where appropriate;

(3) a description of alternative actions which could accomplish some or all of the objectives of the proposed action. These might include alternative engineering techniques, alternative design or location, or fundamental institutional alternatives (such as floodway management programs instead of dam construction.) The description should include alternatives which are beyond the authority of the lead agency to implement on its own. The purpose is to avoid precluding viable alternatives which might have less severe environmental impacts, and to allocate responsibility among the agencies for achievement of the stated objectives with minimal adverse impacts. Other agencies should be consulted in describing such alternatives.

(4) descriptions of the impacts on the human environment of the proposed action and the listed alternatives including the alternative of taking no action. The descriptions should include the economic, social, cultural, aesthetic, and biophysical factors listed in section III(2) of these rules. The number of factors actually analyzed in an environmental impact statement is subject to the lead agency's discretion, and primarily depends on the type and magnitude of the proposed action. Primary and secondary impacts should be described. The descriptions should include:

(a) adverse and beneficial impacts of each alternative;

(b) potential growth-inducing aspects of each alternative;

(c) irreversible commitments of environmental resources including land, air, water and energy resulting from each alternative;

(d) economic and environmental benefits and costs resulting from the proposed action and each alternative. Agencies should attempt to balance the results of their environmental assessments with their assessments of the net economic, technical, and other benefits of the proposed action and alternatives, and use all practicable means to avoid or minimize undesirable consequences for the environment;

(e) a comparison of short-term costs and benefits from the proposed action and alternatives, with the effects on maintenance and enhancement of the long-term productivity of the environment.

(5) source material used in the preparation of the draft; agency personnel contributing to the impact statement and the names of lead agency officials responsible for the environmental impact statement contents and distribution.

VI. USE OF THE ENVIRONMENTAL IMPACT STATEMENT IN AGENCY DECISION MAKING. Section 69-6504(a) of the Act requires that "the policies,

regulations and laws of the state shall be interpreted and administered in accordance with the policies set forth in [MEPA]." After reviewing the environmental effects disclosed in the impact statement, the agency must carefully weigh the environmental costs against the expected benefits of the proposed action. The agency's final decision whether to procede with the project must reflect this balancing analysis. Wherever adverse environmental effects are found to be involved in the proposed action, the agency must indicate in its final recommendation what interests and considerations of state policy justify those effects.

UNIFORM RULES IMPLEMENTING THE MONTANA ENVIRONMENTAL POLICY ACT

Final Version Adopted by
MONTANA COMMISSION ON ENVIRONMENTAL QUALITY
January 15, 1976

NOTE: This final version of the uniform rules implementing the Montana Environmental Policy Act (MEPA) contains all of the amendments made by the Montana Commission on Environmental Quality (MCEQ) to the September 22, 1975, edition of the rules. It must be emphasized, however, that this version of the rules has been prepared in appropriate Montana Administrative Code format for adoption by the Board and Department of Health and Environmental Sciences. Therefore, references to the Board and Department in the rules, and the MAC rule numbers, will have to be changed accordingly by the agencies intending to adopt MEPA rules. Finally, the provisions of subsections (8) and (9) of Rule VII (MAC 16-2.2(2)-P2060) are not part of the uniform version of the rules. These subsections contain the Department's attempt to define what must be included in the applicant's estimated cost of a project as outlined in Section 69-6518, R.C.M. 1947. These subsections implement Recommendation 65 of the Summary of Testimony and Recommendations of the Hearings Officer submitted on January 9, 1976.

Steve Brown

STEVE BROWN, Chairman
Montana Commission on
Environmental Quality

(RULE I) POLICY STATEMENT CONCERNING MEPA RULES (1) The purpose of these rules is to implement Chapter 65, Title 69, the Montana Environmental Policy Act, through the establishment of administrative procedures. In order to fulfill the stated policy and purpose of that act, the Board and Department will conform to the procedures established in the following rules prior to finalization of the Board's and Department's decisions. It must be noted that the act requires that state agencies comply with its terms "to the fullest extent possible". (History: Sec. 82-4203,

82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE II) DEFINITION OF MEPA TERMS

(1) "Emergency actions" are:

(a) projects undertaken, carried out, or approved by the Board or Department to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate government official;

(b) emergency repairs to public service facilities necessary to maintain service; or

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, or welfare.

(2) "Human environment" includes but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment in which Montanans live.

(3) "Lead agency" is the agency of the state that has primary authority for committing the government to a course of action having significant environmental impact, or is the agency chosen to supervise the preparation of a joint environmental impact statement where more than one agency is involved in the action.

(4) "Environmental impact statement" (EIS) is the detailed statement required by Section 69-6504(b)(3), R.C.M. 1947, and can take several different forms:

(a) Draft environmental impact statement is the initial environmental impact statement prepared in accordance with MAC 16-2.2(2)-P2040, subsection (1), [Rule V (1)], and distributed to the appropriate agencies and the public for comment prior to compiling the final environmental impact statements.

(b) Final environmental impact statement is a document summarizing or, if necessary, including the major conclusions and supporting information of a draft environmental impact statement and specifically including the Board's or Department's response to all substantive comments or objections raised by the public or other agencies since issuance of the draft environmental impact statement.

(c) Joint environmental impact statement is an environmental impact statement prepared jointly by more than one agency, state and/or federal, when such agencies are involved in the same or closely related proposed actions.

(5) "Preliminary environmental review" (PER) is a written analysis of a proposed action to determine whether the action might significantly affect the quality of the human environment and therefore require a draft environmental impact statement.

(6) "Programmatic review" is a general analysis of

related agency-initiated actions, programs or policies, or the continuance of a board policy or program which may involve a series of future actions.

(7) "Montana Commission on Environmental Quality" (MCEQ) means the Commission established by Executive Order 4-75.

(8) "Environmental Quality Council" (EQC) means the Council established as provided in Title 69, Chapter 65, R.C.M. 1947.

(9) "Board" means the Board of Health and Environmental Sciences.

(10) "Department" means the Department of Health and Environmental Sciences. (History: Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE III) DETERMINATION OF NECESSITY FOR ENVIRONMENTAL IMPACT STATEMENT Section 69-6504, R.C.M. 1947, requires that environmental impact statements be prepared on "proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment". The following criteria and procedures will be used in determining whether an EIS will be prepared.

(1) An environmental impact statement will not be required for actions in which the Board or Department exercises no discretion, but rather acts upon a given state of facts in a prescribed manner pursuant to statutory or regulatory mandate. Such actions include:

(a) Administrative actions: Routine, clerical or similar functions of the Board or Department, including but not limited to administrative procurements, contracts for consulting services and personnel actions.

(b) Existing facilities: Minor repairs, operations or maintenance of existing equipment or facilities.

(c) Investigation and enforcement: Data collection, inspection of facilities, or enforcement of environmental standards.

(2) A PER shall be prepared by the Department on all proposed actions of the Department or Board, other than those described in subsection (1) of this rule or where the action is clearly a major state action having a significant impact on the human environment, thereby requiring the preparation of an EIS, on which a determination must be made as to the significance of its effect on the environment. If the PER shows a potential significant effect on the human environment, an EIS shall be prepared on that action.

(3) The following are actions which normally require the preparation of an EIS:

(a) the action may significantly affect environmental attributes recognized as being endangered, fragile, or in

severely short supply;

(b) the action may be either significantly growth inducing or inhibiting; or

(c) the action may substantially alter environmental conditions in terms of quality or availability.

(4) The Department shall maintain a list of those activities or functions that fall within the categories described in the preceding subsections of this rule. The list shall be maintained as a public document and copies of the list and any subsequent revisions sent to the MCEQ, the EQC, and any member of the public who has requested a copy of the list. The MCEQ, the EQC, or any member of the public may recommend additions to or deletions from the list. The Department shall review the recommendations for additions to or deletions from the list and advise the person or group making the recommendation in writing of the reasons why the recommended additions or deletions were or were not made. (History Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE IV) PREPARATION OF PRELIMINARY ENVIRONMENTAL REVIEW (1) If the Department conducts a preliminary environmental review to make a determination as to whether the action may have a significant effect on the human environment, such review shall, based on information contained in the completed application or project proposal and other available information, include at a minimum:

(a) an adequate description of the proposed action, including maps and graphs, if appropriate;

(b) an evaluation of the immediate and cumulative impact on the physical environment, including where appropriate: terrestrial and aquatic life and habitats; water quality, quantity and distribution; soil quality, stability and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(c) an evaluation of the immediate and cumulative impact on the human population in the area to be affected by the proposed action, including where appropriate: social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of community and personal income; transportation networks and traffic flows; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; demands for energy; and locally adopted environmental

plans and goals;

(d) a listing of other agencies or groups that have been contacted, or which may have overlapping jurisdiction;

(e) the names of those individuals or groups contributing to and responsible for compiling the PER.

(2) If the PER indicates that the proposed action will have a significant effect on the human environment, an EIS will be prepared in accordance with MAC 16-2.2(2)-P2040 (Rule V).

(3) A PER is a public document and may be inspected upon request by any member of the public or representative of a governmental agency. A member of the public or a governmental entity may obtain a copy of a PER by making a specific request to the Department.

(4) Information which is entitled to confidential treatment under a provision of state law, Board or Department rule, or by order of a court, will be excluded from a PER. The determination of what information is to be so treated will be determined by the Department in consultation with the applicant. If confidential information is deleted from a PER, the Department shall indicate in the PER the general nature of the information deleted. (History: Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE V) PREPARATION, CONTENT, AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS (1) If required by MAC 16-2.2(2)-P2020 (Rule III) or MAC 16-2.2(2)-P2030 (Rule IV), the Department shall prepare a draft environmental impact statement, which shall include:

(a) a description of the nature and objectives of the proposed action;

(b) a description of current environmental conditions in the area affected by the action, including maps and charts where appropriate;

(c) a description of the impacts on the human environment of the proposed action. The description shall include:

(i) the factors listed in MAC 16-2.2(2)-P2030 (Rule IV), where appropriate;

(ii) primary, secondary and cumulative impacts;

(iii) potential growth inducing or inhibiting impacts;

(iv) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

(v) economic and environmental benefits and costs from the proposed action and such information as is reasonably available to assess the economic and environmental cost and benefit of each alternative;

(vi) a comparison of short-term costs and benefits with the effects on maintenance and enhancement of the long-term productivity of the environment.

(d) a description of alternative actions that could be

taken by the Board or Department.

(e) source material used in the preparation of the draft EIS, Department personnel contributing to the impact statement, including a listing of qualifications, and the names of Department officials responsible for the environmental impact statement contents and distribution.

(2) Following preparation of the draft EIS in accordance with subsection (1) of this rule, the Department shall distribute copies to the Governor, the EQC, the appropriate local, state and federal agencies, the applicant whose project is being evaluated by the EIS, and the public for the purpose of consultation and receipt of comments. For the purposes of distribution of the EIS to the public, the Department shall maintain a mailing list of interested or concerned individuals; any person or group may request to be placed on the mailing list for part or all EIS's.

(a) Depending upon the nature and number of substantive comments received in response to the draft statement, the draft statement may satisfy the requirement for a final environmental impact statement. In this case, the Department shall submit one copy of all comments or a summary of a representative sample of comments received in response to the draft statement to the Governor, the EQC, the applicant whose project is being evaluated by the EIS, and to all commenting or consulting parties.

(b) If the Department determines that it will not be necessary to compile a final environmental impact statement, the Department may remove all further time restrictions described in subsections (4)(c) and (d) of this rule not less than fifteen (15) days after sending copies of all comments received on the draft EIS to the parties listed in subsection (2) of this rule. The Department shall also include with the comments notice of the Department's decision not to prepare a final EIS and a statement describing the Department's or Board's proposed course of action. The applicant whose project is being evaluated by the EIS may request an extension of this fifteen (15) day period in order to respond to the written comments that have been received.

(3) A final environmental impact statement shall include, as a minimum:

(a) A summary of major conclusions and supporting information based on the draft environmental impact statement and the responses to substantive comments or objections received on the draft environmental impact statement, stating specifically where such conclusions and information were changed from those which appeared in the draft.

(b) A list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and unless impractical, the text of comments received by the Department. In all cases, the text of a representative sample of comments or a summary of a representative sample of

comments shall be included.

(c) The Department's responses to these comments. These responses shall include a good faith evaluation of the comments received, and a substantive disposition of the issues involved.

(d) New data, information, and explanations derived or obtained subsequent to circulation of the draft.

(e) Following preparation of a final EIS, the Department shall distribute copies to the Governor, the EQC, appropriate state and federal agencies, the applicant, persons who submitted comments on or received a copy of the draft EIS, and be made available to other members of the public upon request for the purpose of consultation and receipt of comments.

(4) The timing and distribution of environmental impact statements shall be as follows:

(a) The listed transmittal date to the Governor and the EQC shall not be earlier than the date of the draft environmental impact statement mailing to the other agencies, organizations, and individuals. Time limits of not less than thirty (30) days nor more than forty-five (45) days shall be established for reply, after which it shall be presumed, unless the commenter requests and receives one extension of time not to exceed fifteen (15) days, that the person or governmental agency consulted has no comment to make.

(b) After the time period for comment on the draft EIS has expired, a copy of all written comments received shall be sent to the applicant whose project is being evaluated by the EIS. The applicant shall be advised that he has a reasonable time to respond in writing to the written or oral comments on the draft EIS and that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may, however, waive his right to respond to the comments submitted on the draft EIS.

(c) Except as provided in subsection (2)(b) of this rule, no action which requires the preparation of an environmental impact statement shall be taken sooner than sixty (60) days after the transmittal date to the Governor and the EQC of the draft environmental impact statement.

(d) Except as provided in subsection (2)(b) of this rule, no Board or Department action shall be taken towards approval of the proposed project sooner than thirty (30) days after the final environmental impact statement has been transmitted to the Governor and the EQC. The listed transmittal date to the Governor and the EQC shall not be earlier than the date of the final environmental impact statement mailing to other appropriate agencies, organizations, and individuals.

(e) After the time period for comment on the final EIS has expired, a copy of all written comments received shall be sent to the applicant whose project is being evaluated by the EIS. The applicant shall be advised that he has a reasonable

time to respond in writing to the written comments on the final EIS and that the applicant's written response must be received before any action can be taken towards approval of the project. The applicant may, however, waive his right to respond to the written comments submitted on the final EIS.

(5) All written comments received on an EIS, including written responses received from the applicant, are public documents and shall be made available to the public upon request. (History: Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE VI) SPECIAL RULES APPLICABLE TO CERTAIN MEPA SITUATIONS An EIS may be prepared jointly by two or more state and/or federal agencies when each have similar or overlapping jurisdictions and lead agency status is not appropriate for any. Where a joint statement is prepared, each participating agency shall take full responsibility for the contents of the published statement.

(1) The Department shall, to the fullest extent possible, adopt and incorporate by reference as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS which has been previously or is being contemporaneously prepared pursuant to the Montana Environmental Policy Act or the National Environmental Policy Act if:

(a) the Department determines that the existing EIS covers an action paralleling or closely related to the action proposed by the Department or Board;

(b) the Department determines, on the basis of its own independent evaluation, that the information, conclusions and responses to comments contained in the existing EIS, which are to be adopted and incorporated by the Department as a part of its draft EIS, have been accurately, fully and fairly gathered and presented; and

(c) the Department determines that the information, conclusions, and responses to comments which will be incorporated in the draft EIS are applicable to the action currently being considered. The existing EIS, or portions adopted or incorporated by reference, shall be circulated as a part of the draft EIS and treated as part of the draft EIS for all purposes, including, if required, preparation of a final EIS. However, where reproduction of the adopted or incorporated portions of a previously prepared EIS would be prohibitively expensive because of the volume of the material involved, the Department may summarize the content of the adopted or incorporated information if the previous EIS has been widely circulated and the Department lists the places where the full text of the previous EIS is available for inspection. Furthermore, the Department shall not be required to send copies of

the existing EIS to persons who have previously received the existing EIS from the Department or from any other state or federal agency which prepared the existing EIS. If all or any part of an existing EIS is adopted and incorporated by reference, then an addendum shall be prepared by the Department as a part of the draft EIS. The addendum shall include as a minimum:

(i) a description of the specific action to be taken;

(ii) any impacts, alternatives, or other items that would be different from those in the original statement; or

(iii) any impacts, alternatives, or other items that were not covered in the original statement.

(iv) The Department shall take full responsibility for the contents of the previous EIS. If the Department disagrees with certain portions of the previous EIS, the points of disagreement shall be specifically discussed in the addendum.

(2) The same time periods specified in MAC 16-2.2(2)-P2040 (Rule V) shall apply to the circulation and review of an addendum as described in the preceding subsection.

(3) Where two or more agencies are involved in similar actions and lead agency status is not clear, the agencies involved shall request assistance from the Montana Commission on Environmental Quality, which shall recommend to the Governor within thirty (30) days after a request for assistance has been made the appropriate agency to be designated as the lead agency. After review of the MCEQ's recommendation, the Governor will designate the lead agency. The lead agency designated by the Governor shall then be responsible for coordinating the implementation of the requirements of these rules.

(4) If an EIS is prepared as required by the National Environmental Policy Act (NEPA), and appropriate regulations adopted as required by that act, a copy of that EIS may be substituted in lieu of the EIS requirements of MEPA. However, if the NEPA EIS does not adequately assess all of the impacts of a proposed action as required by these rules, an addendum shall be prepared in compliance with subsections (1) and (2) of this rule.

(5) The Board or Department may take or permit action having a significant impact on the human environment in an emergency situation without preparing an EIS. Following initiation of the action, the Department shall notify the Governor and the EQC within thirty (30) days as to the need for such an action and the impacts and results of it. If the emergency action will be ongoing over a relatively long period of time, and the possibility exists for partial modification of the action at some point in the process, a PER or an EIS will be prepared at the earliest possible date in the ongoing process. The Board or Department may not delay taking action if the purpose of the delay is to create an emergency situation that will enable the Board or Department to invoke the

provisions of this subsection.

(6) If conflicting provisions of other state laws prevent the Board or Department from fully complying with the provisions of these rules, the Department shall notify the Governor, the MCEQ and EQC and describe the nature of the conflict and a proposed course of action that will enable the Board or Department to comply to the fullest extent possible with the provisions of MEPA. In addition, the Department shall recommend proposals for legislation that will remove the statutory conflict. The report provided for in this subsection shall be prepared at least ninety (90) days before the date upon which each regular session of the Montana Legislature is scheduled to begin.

(7) When a public hearing is held on an EIS, the Department shall advise the applicant whose project is being evaluated by the EIS, every person who has submitted comments on the draft EIS and every person who received a copy of the draft EIS of the date and location of the hearing and that the applicant shall have an opportunity to respond to all oral comments received at the hearing. The applicant may respond orally at the conclusion of the hearing and in writing at a later date. The hearing held pursuant to this subsection shall be held after the draft EIS has been circulated and prior to the preparation of the final EIS. (History: (Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE VII) FEES — ENVIRONMENTAL IMPACT STATEMENTS (1) When an application for a lease, permit, contract, license or certificate is expected to result in the Department incurring expenses in excess of two thousand five hundred dollars ($2,500) to compile an environmental impact statement, the applicant shall be required to pay a fee in an amount which the Department reasonably estimates, as set forth in this rule, will be expended to gather information and data necessary to compile an EIS.

(2) The Department will determine within thirty (30) days after a completed application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this rule. If it is determined that an environmental impact statement is necessary, the Department shall make a preliminary estimate of the costs to compile the statement. This estimate will include a summary of the data and information needs and the itemized cost of acquiring the data and information, including salaries, equipment costs and any other expense associated with the collection of data and information for the EIS.

(3) If the preliminary estimated costs of acquiring the data and information to prepare an EIS total more than two-thousand five-hundred dollars ($2,500), the Department shall

notify the applicant that a fee must be paid and submit an itemized preliminary estimate of the cost of acquiring the data and information necessary to compile an EIS. The applicant shall also be advised that a notarized and detailed estimate of the cost of the project being reviewed in the EIS must be submitted within fifteen (15) days after receipt of the request. In addition, the applicant shall be asked to describe the data and information available or being prepared by the applicant which can possibly be used in the EIS. The applicant may indicate which of the Department's estimated costs of acquiring data and information for the EIS would be duplicative or excessive. The applicant shall be granted upon request an extension of the fifteen (15) day time period for submission of an estimate of the project's cost and a critique of the Department's preliminary EIS data and information accumulation cost assessment.

(4) After receipt of the applicant's estimated cost of the project and analysis of the Department's preliminary estimate of the cost of acquiring information and data for the EIS, the Department shall notify the applicant within fifteen (15) days of the final amount of the fee to be assessed. The fee assessed shall be based on the projected cost of acquiring all of the information and data needed for the EIS. If the applicant has gathered or is in the process of gathering information and data that can be used in the EIS, the Department shall only use that portion of the fee that is needed to verify the information and data. Any unused portion of the fee assessed may be returned to the applicant within a reasonable time after the information and data has been collected or the information and data submitted by the applicant has been verified, but in no event later than the deadline specified in subsection (7) of this rule. The Department may extend the fifteen (15) day time period provided for review of the applicant's submittal for not to exceed forty-five (45) days if it believes that the project cost estimate submitted is inaccurate or additional information must be obtained to verify the accuracy of the project cost estimate. The fee assessed shall not exceed the following limitations:

(a) two per cent (2%) of any estimated cost up to one million dollars ($1,000,000), plus

(b) one per cent (1%) of any estimated cost over one million dollars ($1,000,000) and up to twenty million dollars ($20,000,000), plus

(c) one-half of one per cent (1/2 of 1%) of any estimated cost over twenty million dollars ($20,000,000) and up to one hundred million dollars ($100,000,000), plus

(d) one-quarter of one per cent (1/4 of 1%) of any estimated cost over one hundred million dollars ($100,000,000) and up to three hundred million dollars ($300,000,000), plus

(e) one-eighth of one per cent (1/8 of 1%) of any estimated cost in excess of three hundred million dollars ($300,000,000).

(5) If an applicant for a lease, permit, contract, license or certificate believes that the fee assessed is excessive or does not conform to the requirements of this rule or Section 69-6518, R.C.M. 1947, the applicant may request a hearing before the Board pursuant to the contested case provisions of the Montana Administrative Procedure Act. If a hearing is held on the fee assessed as authorized by this subsection, the Department shall proceed with its analysis of the project wherever possible. The fact that a hearing has been requested shall not be grounds for delaying consideration of an application except to the extent that the portion of the fee in question affects the ability of the Department to collect the data and information necessary for the EIS.

(6) The fee assessed hereunder shall only be used to gather data and information necessary to compile an environmental impact statement. No fee may be assessed if the Department intends only to compile a preliminary environmental review or a programmatic review. If the Department collects a fee and later determines that additional data and information must be collected or that data and information supplied by the applicant and relied upon by the Department is inaccurate or invalid, an additional fee may be assessed under the procedures outlined in subsections (2), (3) and (4) of this rule if the maximum fee has not been collected as provided by subsection (4).

(7) When the Department has completed work on the EIS, a complete accounting of how the Department expended the fee collected shall be submitted to the applicant. If the cost of compiling an environmental impact statement is less than the fee collected, the remainder of the fee shall be refunded to the applicant without interest within forty-five (45) days after work has been completed on the final EIS.

(8) The estimated cost of a project submitted by the applicant as required by this rule shall include an itemized list of the estimated construction, engineering, land acquisition and contingency costs showing various components and how costs are calculated in the following manner:

(a) For new facilities or additions to existing facilities that are subject to the permit provisions of Section 69-3911, R.C.M. 1947, of the Clean Air Act of Montana, the estimated cost shall be itemized by components which have different functions, including, where appropriate, building structure, boiler, generator, acid plant, cooling tower, precipitator, scrubber, baghouse, and any other component associated with the operational, production or pollution control system which is covered by the application. The provisions of this rule do not apply to applications for a variance under

Section 69-3916, R.C.M. 1947, of the Clean Air Act of Montana. A filing fee shall be paid as specified in that section for such applications.

(b) For new facilities or additions to existing facilities that are subject to the permit provisions of Water Pollution Control Act of Montana (Title 69, Chapter 48, R.C.M. 1947), the estimated cost shall be itemized by components which have different functions, including, where appropriate, building structure, production components, treatment works, such as pumps, pipes, lining materials, ponds, ditches, diversions, dams, dikes and machenical treatment works, and any other component associated with the operational, production and pollution control system which is covered by the application.

(c) For new facilities and disposal areas or additions to existing facilities and disposal areas that are subject to the licensing requirements of the Motor Vehicle Wrecking Facilities Act (Title 69, Chapter 68, R.C.M. 1947) and the Refuse Disposal Areas Act (Title 69, Chapter 40, R.C.M. 1947), the estimated cost shall be itemized by components which have different functions, including, where appropriate, building structure, crusher, shredder, caterpillar and any other equipment or vehicle necessary for the proper operation and maintenance of the facility or disposal area.

(d) For new establishments, tourist campgrounds or trailer courts, or additions to existing establishments, tourist campgrounds or trailer courts that are subject to the licensing provisions of the Lodging Establishments Act (Title 34, Chapter 3, R.C.M. 1947), the Food Service Establishments, Markets and Manufacturers Act (Title 27, Chapter 6, R.C.M. 1947), and the Tourist Campgrounds and Trailer Courts Act (Title 69, Chapter 56, R.C.M. 1947), the estimated cost shall be itemized by components which have different functions, including, where appropriate, building structure, heating system, cooling system, sidewalks, storm drains, sewage disposal system, solid waste disposal system, water supply system, street lighting, roads and any other component associated with the construction or operation of the establishment which is covered by the application. If the proposed establishment, tourist campground or trailer court is a subdivision or a part of a subdivision, then the estimated cost of the components shall be submitted as a part of the listing and estimate required by the following subsection.

(e) For new subdivisions or additions to existing subdivisions that are subject to review under the Sanitation in Subdivisions Act (Title 69, Chapter 50, R.C.M. 1947), the estimated cost shall be itemized by components which have different functions, including, where appropriate, building structure, heating system, cooling system, sidewalks, storm drains, sewage disposal system, water supply system, solid waste disposal system, street lighting, roads and any other

component associated with the construction and development of the subdivision which is covered by the application.

(f) No fee shall be collected under this rule when a fee has been collected for the review of the proposed sewage disposal, solid waste disposal and water supply systems for a subdivision as authorized by Section 69-5005, R.C.M. 1947, and MAC 16-2.14(10)-S14341 unless the amount to be collected under this rule exceeds by two thousand five hundred dollars ($2,500) the amount collected under Section 69-5005, R.C.M. 1947, and MAC 16-2.14(10)-S14341. If it is determined that a fee must be collected under this rule, the amount collected under Section 69-5005, R.C.M. 1947, and MAC 16-2.14(10)-S14341 shall be deducted from the amount of the fee collected under this rule.

(9) The Department will make every effort to assist the applicant in preparing an estimated cost of a project. Furthermore, the Department will make appropriate personnel available to the applicant to discuss the Department's estimated cost of compiling the information and data necessary for the EIS. After a fee has been collected and work on the compilation of data and information necessary for the EIS is begun, it is the intention of the Department to return all unused or unneeded portions of the fee as promptly as possible. (History: Sec. 69-6518, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE VIII) PREPARATION, CONTENT AND DISTRIBUTION OF A PROGRAMMATIC REVIEW (1) If the Department is contemplating a series of agency-initiated actions, programs or policies which in part or in total will constitute a major action significantly affecting the human environment, the Department may prepare a programmatic review discussing the impacts of the total series of actions. In deciding whether a programmatic review is necessary, the Department may consult with the Governor, the MCEQ and EQC.

(2) The programmatic review shall include, as a minimum, a concise, analytical discussion of viable alternative policies and the cumulative environmental effects of these alternatives.

(3) The time requirements specified in MAC 16-2.2(2)-P2040 (Rule V) apply to the distribution of programmatic reviews for public comment. (History: Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67, Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

(RULE IX) RETROACTIVE APPLICATION OF THE MEPA RULES — WHERE PROHIBITED Except for the provisions of MAC 16-2.2(2)-P2060 (Rule VII) involving the assessment of a fee, the rules adopted to implement MEPA shall be applied to all applications pending at the time the rules are adopted by the Board or Department, provided that none of the

procedures outlined shall be used to delay the preparation of an EIS which is being prepared at the time the rules are adopted. The provisions of MAC 16-2.2(2)-P2060 (Rule VII) are not applicable to any application for a contract, license, permit, lease or certificate which has been filed prior to the adoption of these rules by the Department. (History: Sec. 82-4203, 82A-107, R.C.M. 1947; IMP Sec. 69-6504, R.C.M. 1947; NEW, MAC Not. No. 16-2-67; Order MAC No. 16-2-26; Adp. 2/9/76; Eff. 3/7/76.)

APPENDIX "F"

STATE OF MONTANA

Office of the Governor

Executive Order No. 4-78

Executive Order re-establishing a Commission on Environmental Qaulity to promulgate rules under the Montana Environmental Policy Act.

Section 69-6504, Revised Codes of Montana (1947), of the Montana Environmental Policy Act, directs the agencies of state government to prepare environmental impact statements analyzing the economic, social, and environmental impacts of major state actions that will have a significant impact on the environment. Subsequent cases in the Montana Supreme Court have emphasized that executive branch agencies are responsible for adopting rules to implement MEPA.

In Executive Order 4-75, dated April 30, 1975, I created a Commission on Environmental Quality to promulgate uniform rules for the implementation by state agencies of the Montana Environmental Policy Act. Recent changes in the national environmental policy act suggest that it is now time to re-evaluate and update these uniform agency rules.

NOW, THEREFORE, I, THOMAS L. JUDGE, in accordance with the authority vested in me as Governor of the State of Montana, do hereby re-establish the Commission on Environmental Quality to promulgate uniform rules for implementation of the Montana Environmental Policy Act. The members of the Commission shall be: the Director of the Department of Natural Resources and Conservation, the Director of the Department of Health and Environmental Sciences, the Commissioner of State Lands, the Director of the Department of Fish and Game, and Lieutenant Governor Ted Schwinden, who shall serve as Chairman. I direct the Commission to work with the Environmental Quality Council and the other agencies of the executive branch and the public in promulgating revised uniform rules for adoption under the Montana Administrative Procedure Act. I also charge the Commission with the continuing responsibility of evaluating and making reccomendations for changes in the rules implementing the Montana Environmental Policy Act.

This Executive Order supercedes Executive Order 4-75 and that order is therefore rescinded.

GIVEN under my hand and the GREAT SEAL of the State of Montana this eighth day of March, in the year of our LORD, One Thousand Nine Hundred and Seventy-eight.

THOMAS L. JUDGE, GOVERNOR
State of Montana

ATTEST:

FRANK MURRAY, SECRETARY OF STATE
State of Montana

BEFORE THE DEPARTMENT OF STATE LANDS
AND THE BOARD OF LAND COMMISSIONERS OF
THE STATE OF MONTANA

In the matter of the repeal of) Rules 26-2.2(18)-P250 through) P2000, P2020, and P2030 per-) taining to the implementation) of the Montana Environmental) Policy Act; and the adoption) of new rules I through X im-) plementing MEPA)	NOTICE OF REPEAL OF ARM 26-2.2(18)-P250 - P2000, P2020, AND P2030, AND ADOPTION OF NEW RULES IMPLEMENTING THE MONTANA ENVIRONMENTAL POLICY ACT

TO: All Interested Persons

1. On July 26, 1979, the Department of State Lands and Board of Land Commissioners published notice of proposed repeal of ARM 26-2.2(18)-P250 - P2000, P2020, and P2030 and adoption of new rules implementing the Montana Environmental Policy Act. A public hearing at which written and oral testimony was taken, was held on August 30, 1979. Written testimony was accepted until September 14, 1979.

2. The department and board has repealed ARM 26-2.2(18)-P250 - P2000, P2020, and P2030, which are found on page 26-14.2, and adopted the proposed new rules with changes as indicated beginning on the next page.

3. The comments received and the department and board's responses to those comments are summarized immediately following the rules (it should be noted that the numbering of the adopted rules have been changed to comply with the Secretary of State's recent directives, but for reasons of convenience to commentators, comments have been organized under the numbering system of the proposed rules).

RULE I POLICY STATEMENT CONCERNING MEPA RULES The purpose of these rules is to implement Chapter 1, Title 75, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. In order to fulfill the stated policy of that act, the department shall conform to the following rules prior to reaching a final decision on actions covered by MEPA. It must be noted that the act requires that state agencies comply with its terms "to the fullest extent possible."

RULE II DEFINITION OF MEPA TERMS (1) "Cumulative impact" means the ~~impact on the environment which results~~

this is State Lands' Notice as it appeared in MAR, Issue No. 1, pp 88-123, Jan 17, 1980.

~~from-the-incremental-impact-of-the-action-when-added-to other-past-and-present-actions,-and-feasible-and-reasonably foreseeable-future-actions.~~ incremental cumulation of impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

(2) "Department" means the Montana Department of State Lands.

(3) "Emergency actions" include, but are not limited to:

(a) projects undertaken, carried out, or approved by the department to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the Governor or other appropriate government entity;

(b) emergency repairs to public service facilities necessary to maintain service; or

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(4) "Environmental impact statement" (EIS) means the detailed written statement required by section 75-1-201, which may take several different forms:

(a) "Draft environmental impact statement" means a detailed written statement prepared to the fullest extent possible in accordance with section 75-1-201(2)(c), and Rule V.

(b) "Final environmental impact statement" means a written statement prepared to the fullest extent possible in accordance with section 75-1-201 and Rule VII and which responds to substantive comments received on the draft environmental impact statement.

(c) "Joint environmental impact statement" means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or closely related proposed action.

(5) "Environmental Quality Council" (EQC) means the council established pursuant to Title 75, Chapter 1.

(6) "Human Environment" includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment.

(7) "Lead agency" means the state agency that has primary authority for committing the government to a course of action having significant environmental impact or the agency designated by the Governor to supervise the preparation of a joint environmental impact statement.

(8) "Preliminary environmental review" (PER) means a brief written statement on a proposed action to determine whether the action will significantly affect the quality of the human environment and therefore requires a draft environmental impact statement.

(9) "Programmatic review" is a general analysis of related agency-initiated actions programs or policies, or the continuance of a broad policy or program which may involve a series of future actions.

(10) "Secondary impact" means the affects an action may have of stimulating, inducing, or inhibiting impacts.

(11) "State agency" or "agency" means an office, commission, committee, board, department, council, division, bureau, or section of the executive branch of state government.

RULE III DETERMINATION OF NECESSITY FOR ENVIRONMENTAL IMPACT STATEMENT (1) ~~In-determining-whether-to-prepare an-EIS,-the-Department-of-State-Lands-shall:~~

~~(a) determine-under-subsection-(6)-below-whether the-proposal-is-one-which;~~

~~(i) normally-requires-an-EIS;~~

~~(ii) normally-does-not-require-either-an-EIS-or a-PER;-or~~

~~(b) if-the-proposed-action-is-not-covered-by-paragraph-(a)-above-or-subsection-(4)-below,-prepare-a-PER; or~~

~~(c)---if-the-proposed-action-is-in-category-(1)(a)(i) above,-but-it-appears-that-there-are-special-circumstances which-may-obviate-the-necessity-for-an-EIS,-prepare-a-PER.~~

~~(2) If-the-proposed-action-is-in-category-(1)(a)(ii) but-it-appears-that-there-are-special-circumstances,-the department-may-prepare-a-PER.~~ The department shall prepare a PER to determine whether an EIS is necessary in the following situations:

(a) when the proposed action is one that normally requires an EIS but, because of special circumstances, the action may not be a major one significantly affecting the quality of the human environment;

(b) when the proposed action is one that normally does not require an EIS, but, because of special circumstances, the action may be a major one significantly affecting the quality of the human environment,

(c) the action is not one required to be listed under (6) below and it is not clear without preparation of a PER whether the proposed action is a major one significantly affecting the quality of the human environment.

(2) The department shall prepare an EIS in the following situations:

(a) when the proposed action is one that normally requires an EIS under (6) of the rule and there are no special circumstances;

(b) when a PER indicates that an EIS is necessary; or

(c) when the proposed action is so clearly a major action of state government significantly affecting the quality of the human environment that no PER is necessary.

(3) The following are categories of actions which normally require the preparation of an EIS:

(a) actions which may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply;

(b) actions which may be either significantly growth inducing or growth inhibiting;

(c) actions which may substantially alter environmental conditions in terms of quality or availability; or

(d) actions which will result in substantial cumulative impacts.

(4) An EIS is not required for the following actions:

(a) administrative actions: routine, clerical or similar functions of the department, including but not limited to administrative procurements, contracts for consulting services, and personnel actions;

(b) existing facilities: minor repairs, operations or maintenance of existing equipment or facilities;

(c) investigation and enforcement: data collection, inspection of facilities, or enforcement of environmental standards;

(d) non-discretionary actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner.

~~(e) rule-making:--rules-promulgated-pursuant-to-law.~~

(5) If the PER shows a significant impact on the quality of the human environment, an EIS shall be prepared on that action.

(6) The department shall ~~maintain~~ adopt a list of those activities or functions that ~~fall-within-paragraphs (1)(a)(i)-and-(1)(a)(ii)(b)-above.~~ normally require an EIS or do not require either an EIS or a PER. ~~The-list-shall be-maintained-as-a-public-document.--Copies-of-the-list and-any-subsequent-revisions-shall-be-sent-to-the-EQC-and any-person-who-has-requested-a-copy.--The-EQC-or-any-person may-recommend-additions-to-or-deletions-from-the-list~~ in accordance with rule-making procedures provided by the Montana Administrative Procedure Act (Chapter 4, Title 2).

RULE IV PREPARATION OF PRELIMINARY ENVIRONMENTAL REVIEW (1) A PER shall include:

(a) an adequate description of the proposed action, including maps and graphs, if appropriate;

(b) an evaluation of the immediate, ~~and~~ cumulative, and secondary impacts on the physical environment, through the use of checklist and a brief narrative, including where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(c) an evaluation of the immediate, ~~and~~ cumulative, and secondary impacts on human population in the area to be affected by the proposed action, through the use of a checklist and brief narrative, including where appropriate: social structures and mores, cultural uniqueness and diversity, access to and quality of recreational and wilderness activities, local and state tax base and tax revenues, agricultural or industrial production, human health, quantity and distribution of community and personal income, transportation networks and traffic flows, quantity and distribution of employment, distribution and density of population and housing, demands for government services, industrial and commercial activity, and locally adopted environmental plans and goals;

(d) a listing of other agencies or groups that have been contacted or which may have overlapping jurisdiction;

(e) the names of those individuals or groups contributing to and responsible for compiling the PER.

(2) A PER is a public document and may be inspected upon request by any person. Any person may obtain a copy of a PER by making a request to the department. The department may give public notice of the availability of the PER and may distribute it. The department shall submit a copy of each completed PER to the EQC.

RULE V ~~PREPARATION, CONTENT, AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS~~ PREPARATION AND CONTENTS OF DRAFT ENVIRONMENTAL STATEMENTS ~~(1) Preparation and contents of draft EIS.~~ If required by Rule III or Rule IV, the department shall prepare a draft environmental impact statement which shall include:

~~(a)~~ (1) a description of the nature and objectives of the proposed action;

~~(b)~~ (2) a description of the current environmental conditions in the area significantly affected by the proposed action, including maps and charts, where appropriate;

~~(c)~~ (3) a description of the impacts on the quality of the human environment by the proposed action including:

~~(i)~~ (a) the factors listed in Rule IV(1)(b) and (c), where appropriate;

~~(ii)~~ (b) primary, secondary, and cumulative impacts;

~~(iii)~~ (c) potential growth inducing or growth inhibiting impacts;

~~(iv)~~ (d) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

~~(v)~~ (e) economic and environmental benefits and costs of the proposed action (if a benefit-cost analysis is considered for the proposed action, it shall be incorporated by reference or appended to the statement to aid in evaluating the environmental consequences);

~~(vi)~~ (f) the relationship between local short-term uses of man's environment with the effects on maintenance and enhancement of the long-term productivity of the environment;

~~(vii)~~ (g) additional or secondary impacts at the local or area level, if any;

~~(d)~~ (4) a description of reasonable alternative actions that could be taken by the department;

~~(e)~~ (5) the proposed agency decision on the proposed action, if appropriate;

~~(f)~~ (6) source material used in the preparation of the draft EIS~~,~~ and;

~~(g)~~ (7) the names of those individuals or groups responsible for compiling the draft EIS and the names of those individuals or groups contrituting to the EIS~~.~~; and

~~(h)~~ (8) a summary as required by Rule XI(3).

~~(2) Distribution of Draft EIS.~~ RULE VI ADOPTION OF DRAFT ENVIRONMENTAL IMPACT STATEMENT AS FINAL ~~Following preparation of the draft EIS in accordance with subsection (1) of this rule, the department shall distribute copies to the Governor, EQC, appropriate local, state and federal agencies, the applicant whose project is being evaluated by the EIS, and those members of the public who request it. The department shall send a copy of only the summary to persons who request it only. For purposes of distribution to the public, the department shall maintain a mailing list of any persons or groups who have requested to be placed on the list for receipt of either the EIS or summary.~~

~~(a)~~ (1) Depending upon the nature and number of substantive comments received in response to the draft environmental impact statement, the draft statement may suffice. In this case, the department shall submit one copy of all comments or a summary of a representative sample of comments received in response to the draft statement to the Governor, EQC, the applicant whose project is being evaluated in the EIS, and all commentators. The department shall determine whether a final EIS is necessary within 30 days of the close of the comment period on the draft EIS.

~~(b)~~ (2) If the department determines that a final EIS is not necessary, it may make a final decision on the proposed action no sooner than fifteen (15) days after complying with ~~paragraph (2)(a)~~ subsection (1) above. The department shall also include with the comments notice of its decision not to prepare a final EIS and a statement describing its proposed course of action. The applicant whose project is being evaluated in the EIS may request an extension of this fifteen (15) day period in order to respond to the written comments that have been received.

~~(3) Preparation and contents of final EIS.~~ RULE VII PREPARATION AND CONTENTS OF FINAL ENVIRONMENTAL IMPACT STATEMENTS A final environmental impact statement shall include:

~~(a)~~ (1) a summary of major conclusions and supporting information from the draft EIS and the responses to substantive comments received on the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft;

~~(b)~~ (2) a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the department (in all cases, a representative sample of comments shall be included);

~~(c)~~ (3) the department's responses to substantive comments (these responses shall include an evaluation of the comments received and a disposition of the issues involved);

~~(d)~~ (4) data, information, and explanations obtained subsequent to circulation of the draft;

~~(e)~~ (5) the department's recommendation for the final agency decision on the proposed action, where appropriate;

~~(4) time limits and distribution requirements of environmental impact statements.~~ RULE VIII TIME LIMITS AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS

~~(a)~~ (1) Following preparation of a ~~final~~ draft EIS, the

department shall distribute copies to the Governor, EQC, appropriate state and federal agencies, the applicant, and persons who ~~submitted comments on or received a copy of the draft EIS, and other members of the public, upon request.~~ have requested copies.

~~(b)~~(2) The listed transmittal date to the Governor and the EQC shall not be earlier than the date that the draft EIS is mailed to other agencies, organizations, and individuals. The department shall allow 30 days for reply; provided that the department may extend this period up to an additional 30 days upon application of any person ~~and for an additional reasonable period of time~~ for good cause. No extension which is otherwise prohibited by law may be granted.

~~(c)~~(3) After the time period for comment on the draft EIS has expired, a copy of all written comments received by the department shall be sent to the applicant whose project is being evaluated in the EIS. The applicant shall be advised that he has a reasonable time to respond in writing to the comments received by the department on the draft EIS and that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may waive his right to respond to the comments on the draft EIS.

~~(d)~~(4) No action which requires the preparation of a final EIS shall be taken sooner than 45 days after the transmittal date of the draft EIS to the Governor and EQC.

~~(e)~~(5) Except as provided in ~~paragraph (2)(b) of this rule,~~ Rule VI(2) a final decision may not be made on the proposed action being evaluated in the EIS after until 15 days have expired from the date of transmittal of the final EIS to the Governor and EQC. The listed transmittal date to the Governor and EQC shall not be earlier than the date that the final EIS is mailed to other agencies, organizations, and individuals.

~~(f)~~(6) Following preparation of a final EIS, the department shall distribute copies to the Governor, EQC, appropriate state and federal agencies, the applicant, persons who submitted comments on or received a copy of the EIS, and other members of the public, upon request.

~~(5) Record of Decision. At the time of its decision, the department shall make a written record of the decision stating how the final EIS was considered and used in its decision making.~~

~~(6)~~(7) ~~Availability of written comments.~~ All written comments received on an EIS, including written responses received from the applicant, shall be made available to the public upon request.

~~(7)~~ (8) ~~Limitations on actions.~~ Until an agency reaches its final decision on the proposed action, no action concerning the proposal shall be taken which would:

(a) have an adverse environmental impact; or

(b) limit the choice of reasonable alternatives, including the no-action alternative.

~~(8)~~ ~~Supplements.~~ RULE IX SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS ~~(a)~~ (1) The department shall prepare supplements to either draft or final environmental impact statements if:

~~(i)~~ (a) the department or the applicant makes substantial changes in the proposed action; or

~~(ii)~~ (b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts~~.~~ which change the basis for decision.

~~(b)~~ (2) The same time periods applicable to draft and final EISs specified in Rules VI and VIII apply to the circulation and review of supplements.

~~(9)~~ ~~Incorporation by reference and adoption.~~ RULE X INCORPORATION BY REFERENCE AND ADOPTION ~~(a)~~ (1) The department shall adopt and incorporate by reference as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS which has been previously or is being contemporaneously prepared pursuant to the Montana Environmental Policy Act or the National Environmental Policy Act if:

~~(i)~~ (a) the department determines that the existing EIS covers an action paralleling or closely related to the action proposed by the department or the applicant;

~~(ii)~~ (b) the department determines, on the basis of its own independent evaluation, that the information contained in the existing EIS has been accurately presented; and

~~(iii)~~ (c) the department determines that the information contained in the existing EIS is applicable to the action currently being considered.

~~(b)~~ (2) ~~The~~ A summary of the existing EIS~~,~~ or the portion adopted or incorporated by reference~~,~~ and a list of places where the full text is available shall be circulated as a part of the EIS and treated as part of the EIS for all purposes, including, if required, preparation of a final EIS. ~~However, where reproduction of the adopted or incorporated portions of a previously prepared EIS would be prohibitively expensive because of the volume of the material involved, the department may summarize the content of the adopted or incorporated information if the previous EIS has been circulated and the agency lists the places where the full text of the adopted or incorporated EIS is available~~

~~for inspection. Furthermore, the department shall not be required to send copies of the existing EIS to persons who have previously received the adopted or incorporated EIS from the department or from any other state or federal agency which prepared the existing EIS.~~

~~(c) If the incorporated EIS does not adequately assess all of the impacts of a proposed action as required by these rules, an addendum shall be prepared in compliance with this rule.~~

~~(d)~~(3) If all or any part of an existing EIS is adopted or incorporated by reference, the department shall prepare an addendum as part of the draft EIS. The addendum shall include as a minimum:

~~(i)~~(a) a description of the specific action to be taken; and

~~(ii)~~(b) any impacts, alternatives, or other items that were not covered in the original statement.

~~(e)~~(4) The department shall take full responsibility for the ~~contents~~ portions of the previous EIS, adopted or incorporated. If the department disagrees with certain portions of the previous EIS, the points of disagreement shall be specifically discussed in the addendum.

~~(f)~~(5) No material may be adopted or incorporated by reference unless it is reasonably available for inspection by interested persons within the time allowed for comment.

(6) Where part of an existing EIS or contemporaneously prepared EIS is incorporated by reference, that part incorporated shall include sufficient material to insure the part incorporated will be considered in the context it was presented in the original EIS.

~~(10) Length, format and summary.~~ RULE XI LENGTH, FORMAT, AND SUMMARY OF ENVIRONMENTAL IMPACT STATEMENT

~~(a)~~(1) The recommended maximum length of the text of either a draft or final EIS is 150 pages. For an EIS on a complex proposal the recommended maximum length is 300 pages.

~~(b)~~(2) An EIS shall be written in plain and concise language.

~~(c)~~(3) ~~If the EIS is long and complex,~~ The department shall prepare with the draft ~~or~~ and final EIS a brief summary which shall be available for distribution separate from the EIS. ~~If a summary is prepared, it~~ The summary shall describe:

~~(i)~~(a) the proposed action being evaluated by the EIS, the impacts, and the alternatives;

~~(ii)~~(b) areas of controversy and major conclusions; and

~~(iii)~~(c) the department's proposed decision, when appropriate.

RULE XII INTERAGENCY COOPERATION When it is lead agency, the department may request the participation in preparation of an EIS of other state agencies which have special expertise in areas which should be addressed in the EIS. When participation of the department is requested under this rule, it shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the agency collecting the EIS fee if one is collected.

RULE ~~VI~~ XIII JOINT ENVIRONMENTAL IMPACT STATEMENTS (1) ~~Lead agency.~~ If another state agency also has jurisdiction over a project, proposal, or major state action which ~~may~~ will have a significant impact on the quality of the human environment and is clearly the lead agency, the department shall cooperate with the lead agency in the preparation of a joint EIS. If the department is clearly the lead agency, it shall be responsible for coordinating the preparation of the EIS as required by this rule. When two or more agencies have jurisdiction over the same project, proposal or major state action and lead agency status cannot be resolved, the department shall request a determination from the Governor. The department shall resolve the lead agency question or submit it to the Governor within 15 days of complete application.

~~(2) Participation.--When it is lead agency, the department may request the participation of other state agencies which have special expertise in areas which should be addressed in the EIS.--When participation of the department is requested under this rule, it shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the agency collecting the MEPA fee if one is collected.~~

~~(3)~~(2) ~~Federal and local agencies.~~ The department shall cooperate with federal and local agencies in preparing EISs. This cooperation may include:

(a) joint environmental research studies,

(b) joint public hearings, or

(c) joint environmental impact statements. (When federal laws have EIS requirements, the department ~~may~~ shall, when practical and expedient, cooperate in fulfilling the requirements of the federal as well as the state laws so that one document will comply with all applicable laws.)~~.~~

RULE ~~VII~~ XIV PREPARATION, CONTENT AND DISTRIBUTION OF A PROGRAMMATIC REVIEW (1) If the department is contemplating a series of agency-initiated actions, programs, or policies which in part or in total will constitute a major state action significantly affecting the quality of the human

environment, the department may prepare a programmatic review discussing the impacts of the series of actions.

(2) The programmatic review shall include, as a minimum, a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives.

(3) The time limits specified for distribution and public comment in ~~Rule V(4)~~ Rule VIII apply to the distribution of programmatic reviews.

(4) While work on a programmatic EIS is in progress, the department may not take major state actions covered by the program in that interim period unless such action:

(a) is part of an ongoing program;

(b) is justified independently of the program; or

(c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or foreclose reasonable alternatives.

(5) Actions taken under this subsection (4) shall be accompanied by an EIS, if required.

Rule ~~VIII~~ XV ~~SPECIAL-RULES-APPLICABLE-TO-CERTAIN MEPA-SITUATIONS~~ ~~(1) Emergencies.~~ EMERGENCIES The department may take or permit action having a significant impact on the quality of the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the department shall notify the Governor and the EQC as to the need for such action and the impacts and results of it. Emergency actions shall be limited to those actions immediately necessary to control the ~~immediate~~ impacts of the emergency.

~~(2) Confidentiality.~~ RULE XVI CONFIDENTIALITY Information declared confidential by state law or by an order of a court shall be excluded from a PER and EIS. The agency shall briefly state the general topic of the confidential information excluded.

~~(3) Resolution-of-statutory-conflicts.~~ RULE XVII RESOLUTION OF STATUTORY CONFLICTS If conflicting provisions of other state laws prevent the department from fully complying with ~~these rules~~ this subchapter, the department shall notify the Governor and EQC of the nature of the conflict and shall suggest a proposed course of action that will enable the department to comply to the fullest extent possible with the provisions of MEPA. ~~and~~ This modification shall be prepared within 45 days of decision on the project, proposal, or major state action.

~~(4) Disclosure.~~ RULE XVIII DISCLOSURE No person who has a financial interest in the outcome of the project may contract with the department for the preparation of an EIS or any portion thereof. Persons contracting with the department in the preparation of an EIS must execute a disclosure statement, in affidavit form prepared by the department, demonstrating compliance with this prohibition.

RULE ~~IX~~ XIX PUBLIC HEARINGS (1) When a public hearing is held on an EIS, the department shall advise the applicant whose project is being evaluated in the EIS, persons who have submitted comments on the draft EIS, and persons who received a copy of the draft EIS of the date and location of the hearing and that the applicant shall have an opportunity to respond to all oral comments received at the hearing. The department shall also issue a news release to radio stations and newspapers of general circulation in the area to be affected by the proposal~~.~~ prior to the hearing. If the newspaper articles pursuant to these news releases do not appear, the department shall cause a legal notice to appear in a newspaper of general circulation in the area to be affected. The news release and notice shall advise the public as to the nature of testimony it wishes to receive at the hearing. The applicant may respond orally at the conclusion of the hearing and in writing at a later date. The hearing shall be held after the draft EIS has been circulated and prior to preparation of the final EIS.

(2) The department shall hold a public hearing ~~when~~ if requested within 20 days of issuance of the draft EIS by either:

(a) 10% or 25, whichever is less, of the persons who will be directly affected by the proposed action, or

(b) by another agency which has jurisdiction over the action, or

(c) an association having not less than 25 members who will be directly affected. Instances of doubt shall be resolved in favor of holding a public hearing.

(3) No person may give testimony at the hearing as a representative of a participating agency. Such a representative may, however, at the discretion of the hearing officer, give a statement regarding his or her agency's authority on procedures and answer questions from the public.

RULE XX RETROACTIVE APPLICATION OF THE MEPA RULES AMENDMENTS These amended rules adopted to implement MEPA apply ~~to all applications pending at the time these rules are adopted by the department, provided that the procedures outlined herein may not be used to delay the preparation~~

~~of an EIS in preparation at the time the rules are adopted.~~ to all applications filed after the effective date of these amendments and to all applications for which a draft EIS has not been filed with the Governor prior to the effective date of these amendments.

The following are summaries of the comments received and the Department's response to those comments:

RULE I POLICY STATEMENT CONCERNING MEPA RULES

No comments received.

RULE II DEFINITIONS

(1) COMMENT: Add a "(1)(d) which reads emergency repairs to any facility to prevent economic losses or dislocations" so that emergency provisions cover situations such as a fire at a refinery, natural gas plant, grain elevator, flour mill, etc.

RESPONSE: Most situations similar to the examples given are no longer in the purview of the state permitting process. Where no state action is involved, MEPA would clearly not apply and no additional emergency exclusion would be necessary in the rules. The proposal is therefore rejected.

(2) COMMENT: Amend (2) to read: "(2) Human environment means those factors bearing directly upon the public health, welfare and safety, including but not limited to biological, physical, social, economic, cultural and esthetic factors."

RESPONSE: Public health, welfare, and safety are a subset of the biological, physical, social, economic, cultural, and aesthetic factors listed in the proposed definition. While health, safety and welfare are specifically mentioned in MEPA, it is apparent that these concerns are not the primary focus of MEPA, any more than are the other concerns mentioned. The definition proposed covers all of the concerns of MEPA without focusing on any one of them. The proposal is therefore rejected.

(3) COMMENT: The definition of human environment is written in a way that would require compliance with MEPA procedures in cases where only the economic or social environment is likely to be affected. The definition used in the CEQ regulations implementing the National Environmental Policy Act should be adopted.

RESPONSE: There is nothing in the definition of "human environment" that implies compliance with MEPA procedures is mandatory only when the economic or social environment is affected. Compliance with MEPA procedures is required when a state action having a significant impact on the human environment is contemplated, whether significance of that impact is determined through interrelated impacts involving all components of the human environment or through impact on an individual component listed in the definition. The proposal is therefore rejected.

(4) COMMENT: The word "substantive" in (4)(6) should be deleted as it provides too much latitude to the agency to ignore comments to the EIS. An EIS is in the nature of a rule making and, under Montana law, all comments to rule-makings must be responded to. The agency has no latitude to refuse to respond to any comments.

Response: First, the EIS process is not, under the law, the same as rule-making. Second, a substantive comment is one that elicits an agency response. Many comments expressing opinions or preferences neither require nor anticipate an agency response. Still other comments may delve into philosophical issues beyond the scope of the EIS under consideration. The redundancy achieved with such phrases as "comment noted" or "no response necessary" or the repetition of the agency response to the same comment from numerous sources should be eliminated in an effort to streamline the EIS process. The proposal is therefore rejected.

(5) COMMENT: Several commentators suggested that the definition of cumulative impact in (7) is too broad and vague. One suggested eliminating the definition. Other suggested modification.

RESPONSE: Cumulative impacts must be addressed so that a state agency can "fulfill the responsibilities of each generation as trustee of the environment of succeeding generations" 75110 3(2)(c)(iv). "Therefore, simply deleting the definition is not an acceptable approach. The definition has been altered to be more explicit and incorporate most of the suggestions offered.

(6) COMMENT: This rule should contain a definition of "secondary impacts".

RESPONSE: Since "cumulative" and "secondary" are not synonomous, a definition of "secondary impact" similar to the one suggested has been included in order to distinguish between the terms.

RULE III DETERMINATION OF NECESSITY FOR ENVIRONMENTAL IMPACT STATEMENT

(1) COMMENT: Paragraph (1)(b) and (c) and (2) are ambiguous and don't adequately define those situations where the preparation of a PER is required or advisable. Also, the term "special circumstances" is not defined and yet is determinative of whether a PER is required.

RESPONSE: Subsections (1) and (2) have been rewritten to eliminate ambiguity. The term "special circumstances" includes factors which cannot reasonably be foreseen. Therefore the term cannot be more specifically defined.

(2) COMMENT: Paragraph (3)(a) and (c) are too subjective and could be simplified by combining (a) and (c).

RESPONSE: Because (a) and (c) involve separate concepts and because the language proposed by the commentator is so general as to provide almost no objective criteria, the comment has been rejected.

(3) COMMENT: Delete (3)(d) which states that an EIS will normally be required if the action will result in substantial cumulative impacts since any significant impact will be covered by an EIS and the definition of "cumulative impact" could be construed as broadening the EIS into infinity.

RESPONSE: The comment has been rejected because "any significant impact" may not naturally include substantial cumulative impacts. The inclusion of (3)(d) assures that an EIS will be done on an action if it will result in substantial cumulative impacts.

(4) COMMENT: Section (3) should be expanded to include: (e) actions which may generate additional or secondary impacts which may have direct or indirect local, statewide or regional implications: (g) actions which may have irreversible environmental effects; and (h) actions which are likely to be precedent setting or controversial.

RESPONSE: The comment proposing the inclusion of (3)(b) is rejected because it expands the scope of the EIS requirement and many times will be included within other categories of (3).

The comment proposing the inclusion of (3)(g) is rejected since it is already covered by (3). Also, not all irreversible impacts are significant.

The inclusion of (3)(f) is rejected since regional and statewide implications are implicity included in (b) and (d).

The inclusion of (3)(e) is rejected because it is already covered in (3)(b).

(5) COMMENTS: In (4)(e), rulemaking should not be totally excluded from EIS requirements as proposed. Section 75-1-201(c) MCA requires an EIS on proposed rules because a rule is legislation and because a rule may be a major state action having a significant impact on the human environment. Also, the fact that legislature rejected bills in 1977 and 1979 which would have excluded legislation and rulemaking from the MEPA process indicates intention of legislature that major rulemaking proposals be subject to the MEPA process. However, a full-blown EIS is not required on rulemaking. An abbreviated document describing the proposed rule and its effect on the environment and those to be affected would suffice. Also, adoption of rules required by federal government should be excluded.

RESPONSE: Commentators, although not in accord on reasoning, were unamious in requesting that the rulemaking exemption be eliminated. The comment is therefore accepted and the exception has been eliminated.

(6) COMMENT: Subsection (5) should read as follows: "If the PER shows a significant negative impact on the human environment an environmental impact statement ~~shall~~ may be prepared on that action."

RESPONSE: This comment is rejected because MEPA requires that an EIS must be done if the PER shows that there will be a significant impact on the quality of the human environment.

(7) COMMENT: Subsection (6) requires too much formality and could hamper additions or deletions of actions to lists which normally require or do not require an EIS.

RESPONSE: This comment has been rejected because the lists developed under (6) constitute rules under the APA.

(8) COMMENT: Section (6) should provide the criteria for making additions and deletions to lists of activities that fall within sections (1)(a)(i) and (1)(a)(ii).

RESPONSE: This comment has been rejected because the criteria used for making additions or deletions developed

under (6) can be adequately discussed at the rulemaking hearings on adoption of the tests.

(9) COMMENT: Lists of activities which normally require or do not require an EIS should be adopted as a rule.

RESPONSE: This comment has been accepted and the rule corrected accordingly.

(10) COMMENT: A new section which sets time limits of department determination as to whether a PER or EIS is necessary.

RESPONSE: Time limits for action on a permit application are set by the statutes under which the applications are submitted. These time limits supercede MEPA time provisions (see Kadillak v. Anconda Co., et al, 36 St. Rep. 1820) and render further limitations unnecessary. The comment is therefore rejected.

RULE IV PREPARATION OF PRELIMINARY ENVIRONMENTAL REVIEW

(1) COMMENT: Combine paragraph (1)(b) and (c) into one subsection (b). In (1)(b), replace the phrase "physical environment" with "human environment" in (1)(b).

RESPONSE: The first suggestion would substitute one subsection (b) containing all the criteria presently listed in subsections (b) and (c) and would combine the term "physical environment" of subsection (b) and the term "human population" of subsection (c) into one term "human environment." This would represent no substantive change. The present division into two subsections is a natural division into two subject areas which serve to make the rule more readable. The proposed changes are rejected.

(2) COMMENT: The qualifications of the contributors to the PER should be given in the PER.

RESPONSE: The purpose of the PER is to allow the agency to determine whether an EIS is necessary. It is an internal document prepared by agency personnel. Qualifications of contributors are already known by the agency. The comment is therefore rejected.

(3) COMMENT: PERs should be opened up to public participation and comment.

RESPONSE: By Rule III(5) the function of a PER is to determine if the proposed action will have a significant impact on the human environment. Thus the requirement of MEPA is met. PERs are internal decision-making documents that are not specifically required by MEPA. They are designed to require that an agency document its decision whether an EIS is required and to streamline the implementation of MEPA by ensuring that an EIS is done only for actions "significantly affecting the quality of the human environment." Section 75-1-201 MCA. Rule IV (2) recognizes PERs as public documents and provide that the agency may give public notice of and distribute a PER. The comment is therefore rejected.

(4) COMMENT: Paragraph (1)(d) should require the PER to include a list of other agencies with overlapping authority along with a citation to their authority plus a list of "permits, licenses and approvals" required for the proposed action and require the agency preparing the PER must consult with other agencies possessing jurisdiction and expertise.

RESPONSE: A list of statutory and regulatory authority and "permits, licenses, and approvals" is outside the scope of the PER, the purpose of which is to determine whether the proposed action is a major one significantly affecting the human environment. MEPA requires inter-agency consultation only in the preparation of an EIS. However, agencies do consult with other agencies when necessary and do not when it is not beneficial. An across-the-board consultation requirement would not be beneficial. The comment is therefore rejected.

(5) COMMENT: Paragraph (1)(c) (and possibly (1)(b) although not specifically mentioned) should include an evaluation of the secondary impacts along with immediate and cumulative impacts.

RESPONSE: Both IV(1)(b) and (1)(c) are amended to require an evaluation of secondary impacts because an EIS (Rule V (3)(b) requires an assessment of "primary, secondary, and cumulative impacts".

(6) COMMENT: Eliminate the criteria "access to and quality of recreational and wilderness activities" from (1)(c).

RESPONSE: These criteria represent potential impacts that may significantly affect "the quality of the human environment" (75-1-201 (2)(c) and, therefore, are properly

included as one of the criteria to be considered in a PER. The comment is therefore rejected.

(7) COMMENT: Although the definition of a "preliminary environmental review" has been changed to a "brief written statement", this intent is not reflected in Rule IV. The new rule does not differ in any respect from the old rule, and upon review, it can be seen that the requirements contained within the rule are not conducive to a "brief written statement".

RESPONSE: Rule IV has been changed from the existing rules by the addition of the phrase "an evaluation. . ., through the use of a checklist and a brief narrative. . ." in both (1)(b) and (c). This format is now used by several agencies and the length of PERs has been considerably reduced over those written in past years. A brief narrative is included in the PER usually only for those impacts identified as being major in the checklist of evaluation criteria listed in Rule IV (1)(b) and (c). The comment is therefore rejected.

(8) COMMENT: Reword (2) to provide that an individual may review a copy of the PER "in the courthouse of the county in which a project is to be located" or obtain a copy from the agency for cost. The suggested wording would eliminate the provision that an agency may give public notice of and distribute a PER, and the requirement that the agency submit a copy to EQC.

RESPONSE: Obtaining a PER upon request makes the document sufficiently available to the public. Submitting a copy of the PER to EQC is well within the intent of MEPA in establishing the EQC. The comment is therefore rejected.

(9) COMMENT: Rule IV does not guarantee the protection of confidentiality of proprietary information.

RESPONSE: Rule VIII (2) provides that: "Information declared confidential by state law or by an order of a court shall be excluded from a PER and EIS." This provision protects confidential information and balances Section 9 and 10 of Article II, 1972 Constitution of Montana and reflects statutory law under which state agencies operate. The comment is therefore rejected.

RULE V PREPARATION, CONTENT, AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS

(1) COMMENT: Paragraph (1)(c) should be modified to reflect subsection (2) where a summary is required.

RESPONSE: The department agrees. The rule has been amended accordingly.

(2) COMMENT: Where a cost-benefit analysis is used, its methodology should be disclosed.

RESPONSE: This proposal has been rejected because its acceptance would unnecessarily extend the length of the EIS. When the methodology is questioned, it can be provided and considered in the final EIS.

(3) COMMENT: Subparagraph (1)(c)(vi) is unclear as it does not define "enhancement" of the environment and there is an implication that man can improve nature's productive ability.

RESPONSE: The subparagraph commented upon is but one part of the rule setting forth the matter that is to be included in a draft EIS. The subject requirement is a statutory requirement as set forth at 75-1-201(2)(c)(iv). The commentator's implication regarding man's inability to increase nature's productivity with artificial means is inappropriate in this instance as MEPA requires a consideration of these matters. The comment is therefore rejected.

(4) COMMENT: Delete (1)(c)(vii) as there is no definition of "secondary" or "cumulative" with the possible result of a broadening of the scope of an EIS.

RESPONSE: A narrower definition has been provided in Rule II. The comment is therefore rejected.

(5) COMMENT: The proposed wording in (1)(d) is improper and illegal because the agency must look at all alternatives, not just those available to the agency. A bill with language similar to the wording of this rule was killed by a recent legislature.

RESPONSE: The action of the legislature in rejecting a proposed bill is subject to a variety of interpretations, none of which reach the level of statutory requirement. State agencies may make rules to implement MEPA. So long these rules are within the authority of MEPA, reasonable in their requirements, and not prohibited by or in conflict with other state law, they are valid exercises of administrative authority. When the reviewer has a different view as to alternatives, those may be addressed in comments to the DEIS and in the FEIS, The comment is therefore rejected.

COMMENT: In (1)(f), the only source material to be used is that which is acceptable, and the agency must make a good-faith effort to obtain all available scientifically prepared source material.

RESPONSE: This sets forth as a requirement for inclusion in the draft environmental impact statement a listing of the source material used in the preparation of that document. If a reviewer of a draft feels that improper source material was used or that source material was overlooked and should be included, that person has the opportunity to comment on and provide the information during the comment period. The comment is therefore rejected.

(7) COMMENT: The new rules must contain the qualifications of persons compiling and contributing to an EIS.

RESPONSE: Requiring listing of qualifications does nothing to assist in preparation or evaluation of the EIS. The listing of the name of the compiler or preparer of the draft, the names of individuals or groups contributing to the draft EIS and the EIS provide the information necessary to evaluate the level of professional input in any EIS. The comment is therefore rejected.

(8) COMMENT: There should be clarification of the circumstances under which substative responses to comments will be required.

RESPONSE: The proposed language (not repeated here) permits as much, if not more, subjective determination than the rule as presently written. The comment is therefore rejected.

(9) COMMENT: A charge should be required for distribution of a DEIS to members of the public and copies of the DEIS made available at the local county courthouse for public inspection.

RESPONSE: The costs of printing and postage presently are an insignificant portion of the preparation of most DEIS's. Where these costs become significant, agencies have sufficient authority to charge those who want copies of a DEIS.

Requiring placement of copies in a county courthouse serves no purpose as there is no official repository for documents of this type. The department cannot regulate county clerk and recorders by rule. The result would be

inconsistent treatment of the documents by the various counties with no assurance the public would have access to them. The comment is therefore rejected.

(10) COMMENT: There should be a deadline for determination that a FEIS is not necessary.

RESPONSE: The department agrees. A 30 day time period has been included.

(11) COMMENT: When an agency determines that a final EIS is not necessary, there should be a maximum time limit set for making that final decision. The suggestion provided is that 30 days or within the applicable statutory review period is a sufficient time for making a final decision in this instance.

RESPONSE: The legislation under which a permit is issued sets the time limit for decision. The comment is therefore rejected.

(12) COMMENT: Subsection (2) should be amended to provide that the final decision may be appealed.

RESPONSE: The comment is unclear as to what action is to be appealable, what body or party might appeal the action, or to whom appeal should be allowable. The statutes under which final decisions may or may not be appealed provide the legislature's decision on appealability. The comment is therefore rejected.

(13) COMMENT: Suggested modifications to subsection (3) are to provide an agency with greater discretion in the preparation of the FEIS.

RESPONSE: The subsection as drafted provides an agency with sufficient discretion in the preparation of the FEIS - some commenters feel too much. The comment is therefore rejected.

(14) COMMENT: An agency should not be burdened with selecting "substantive" comments and providing a "representative" sample; thus, all responses should be provided to all commentators. In addition, the requirement is too subjective and gives illegal latitude to a department in its determination of which comments merit response.

RESPONSE: MEPA does not require a written response to every comment. The comments received may not always relate

to the project under consideration, the environmental impact under consideration, or even the state agency that is holding the hearing. In addition, some comments are placed on the record for the purpose of position only and may be rhetorical in nature. To include these comments in the final EIS is to increase unnecessarily the staff workload and the length of the EIS. Further, the comments themselves are available for review at the agency's office should a person wish to review them. The comment is therefore rejected.

(15) COMMENT: The following should be added to paragraph (3)(b): "In all cases, the qualifications of those in dividuals contributing factual data or giving expert opinions shall be included."

RESPONSE: The comment is rejected for the reasons set forth in the response to comment #7 to this rule.

(16) COMMENT: A requirement that all acceptable and relevant data and information available prior to distribution of the draft and not used in the draft must be included in the final should be added to (3)(d).

RESPONSE: Commentator anticipates that all information available prior to distribution of the draft that is acceptable and relevant should be utilized in a final EIS. To do so in each instance would increase the length of an EIS considerably. It would unnecessarily repeat information that had been provided in other impact statements. It also introduces a level of subjectivity into the process without guidelines or standards which would further complicate and confuse the EIS preparation process. The commentator's apparent fear and complaint are that agencies do not always include all source material that is available. This is a decision of the agency. Also, a reason for having the source material listed in the draft EIS is that commentators may provide further source material or comments on the adequacy of source material utilized. The comment is therefore rejected.

(17) COMMENT: The inclusion of the agency's final decision on the proposed action, as provided in subsection (e), should not be part of the EIS.

RESPONSE: The final decision is made after distribution of the final EIS. Therefore, subsection (e) has been modified to provide that an agency recommendation may be included in the final EIS, where appropriate.

(18) COMMENT: The copies should be made available to government agencies, the applicant, and in the courthouse of the affected county, with others to be purchased from the agency at cost.

RESPONSE: The comment is rejected for the reasons set fourth in comment #9 to this rule.

(19) COMMENT: The open-ended time limit for a draft EIS will provide conflict with federal EIS's when a joint EIS is being prepared.

RESPONSE: The open-ended time frame allows for coordination with federal agencies. In most cases, the crucial time limitation is the permit decision-making rather than the draft time frame. That permit time frame cannot be changed by these rules. The comment is therefore rejected.

(20) COMMENT: There are typographical errors in this rule which make understanding subsections (a)(b)(c) and (d) difficult. Subsection (a) should be related to a draft EIS in the first sentence and that (b)(c) and (d) be clarified to indicate that they apply to the draft EIS and not to a final EIS.

RESPONSE: This rule has been modified in paragraph (a) to speak directly to the DEIS. The actions under (b) follow those of (a) and apply to the DEIS not the FEIS. A new paragraph (f) is added to address distribution of the FEIS. Also, paragraph (e) has been clarified.

(21) COMMENT: A necessity hearing should be required where a department desires to extend the time for comment from those receiving a copy of the final EIS.

RESPONSE: The adoption of this suggestion would further increase the time available for reply to the environmental impact statement. A necessity hearing would require adequate notice, a time for hearing, and a time for preparation of the decision from the hearing. During these activities, the reply period would be held open in order to provide fairness to all parties. Because of the potential for increased delay, the comment is rejected.

(22) COMMENT: The present 60 day time limit should be maintained in (4)(b) because it provides a "cut and dried" deadline, a reasonable time for comment, eliminates loopholes, and delay, and unreasonable expense, and will not bog down projects.

RESPONSE: The department agrees. The rule has been amended to provide 30-day comment period with a 30-day extension for cause.

(23) COMMENT: Paragraph (4)(b) permits unnecessary delay and suggests that the draft should be submitted to the governor and EQC at the same time it is mailed to others. Further, a maximum of 15 days following the comment period should be set for beginnning action on preparation of a final EIS and a maximum of 90 days to complete a final EIS.

RESPONSE: The draft is to be submitted to the governor and the EQC at the same time as it is submitted to others. That is the purpose of the wording in (b). Further, it is the design of this subsection (b) to assure that the starting date for comment is the same for all parties. Thus, no one would have an argument or claim that they were short-changed in their comment period. Time limits for preparation of the final EIS are provided in the permitting statute. The comment is therefore rejected.

(24) COMMENT: In (4)(b) there is no "triggering mechanism" for extension of the original 30-day response period. Proposed wording is as follows ". . .shall extend this period by 30 days upon request by any affected party and for. . ."

RESPONSE: The comment is accepted. The triggering mechanism has been included but it has not been limited to application by affected parties.

(25) COMMENT: Paragraph (4)(b) allows for unnecessary delay. The maximum number of days following the comment period should be set for beginning action and a 90-day maximum should be set for completion of a final EIS.

RESPONSE: This comment is rejected for the reasons set forth in the response to comments #22 and #23.

(26) COMMENT: Delete requirement for stating how the EIS was considered and used in decision-making (5), as being outside the scope of MEPA, and as being precluded by legislative action.

RESPONSE: The department agrees because MEPA has been interpreted by the executive board as procedural. The proposed rule may be inconsistent with this interpretation. Subsection (5) has been deleted.

(27) COMMENT: The record of decision provided for in (5) should be more inclusive and explicit.

RESPONSE: The record of decision requirement has been deleted. The proposal is therefore rejected.

(28) COMMENT: The written comments on an EIS should be on file at the affected county courthouse or available from the agency for a printing and postage charge.

RESPONSE: As written, the rule requires the EIS comments be available upon request. Each agency may determine whether a charge is necessary. The statutory responsibilities of county officers do not include filing of EIS's or comments thereon. The agency cannot regulate county clerk and records by rule. There is nothing to prevent a county officer from requesting and keeping on file an EIS or comments thereon.

(29) COMMENT: Delete the no-action alternative in subsection (7).

RESPONSE: No reason was given for the comment. To delete this alternative is to unnecessarily restrict an agency's possible choice of decisions. The proposal is therefore rejected.

(30) COMMENT: There is potential conflict between specific statutory requirements and the limitations set forth in this subsection.

RESPONSE: No modification of the subsection is necessary. Where a specific statutory requirement exists, that requirement overrides the MEPA rules and will be adhered to by a state agency (see Kadillak v. Anaconda Co., et al., supra).

(31) COMMENT: Supplements to an EIS due to new circumstances should be required only when the new circumstances change the basis for the decision and only when discovered prior to implementation of the final agency decision.

RESPONSE: The department agrees. The proposed changes have been implemented.

(32) COMMENT: There are no time periods incorporated for the final EIS. Thus, there are no time periods for supplements.

RESPONSE: Rule V(4) contains time limits for FEISs. The comment is therefore rejected.

(33) COMMENT: Subparagraph (8)(a)(i) implies an agency has authority to make changes in the applicant's proposed action under provisions of MEPA rather than other state law.

RESPONSE: While the comment is well-founded, this provision or statement provides that where the agency does have authority and does make a substantial change in the proposed action, then a supplement must be prepared in the same manner as if and when the applicant makes a substantial change. This subsection is not designed to allow the agency to require such changes. The comment is therefore rejected.

(34) COMMENT: As written, subsection (9) permits incorporation of information out of its original context. This should not be allowed.

RESPONSE: The department agrees. The rule has been modified by adding to (a) "where a part of an existing EIS or contemporaneously prepared EIS is incorporated by reference, that part incorporated shall include sufficient material to insure the part incorporated will be considered in the context it was presented in the original EIS."

(35) COMMENT: The legislature considered and did not accept a bill that would achieve the effect as this subsection (9), thus, it should be carefully reviewed before adoption.

RESPONSE: See response to Comment #5.

(36) COMMENT: While the provision may help eliminate some duplication in the EIS process, it must be made clear that the portions incorporated pursuant to (9) are subject to comment by the public and must be responded to by the department.

RESPONSE: No response is needed in this instance as no changes are requested. It is a comment for emphasis. The agency would anticipate comment to the material placed in the EIS and also responding to and correcting them where necessary.

However, in subsection (9)(e), the responsibility which the agency accepts is full responsibility for the portions of the previous EIS as adopted by the agency, not for each and everything not adopted. The wording of (e) has been changed to reflect this.

(37) COMMENT: Provision for incorporation of information from other than existing EIS's in (9)(a) should be made as this would help streamline the EIS process.

RESPONSE: The purpose of listing source material in an EIS is to provide knowledge of the location of information

used in an EIS. The reason for incorporation is to present material that has been addressed previously for EIS purposes. Information in sources other than EISs, while of value in the preparation of an EIS, is unlikely to have been compiled to address the same or similar issue presented in the EIS. The comment is therefore rejected.

(38) COMMENT: In (9)(b), the agency should have the option of circulating a previous EIS or listing the places such EIS may be found rather than being required to do both. Thus, the word "and" should be stricken in the second sentence and replaced by "or".

RESPONSE: To effectively implement this suggestion the comment period for DEISs would need to be extended, thereby lengthening the EIS process. The comment is therefore rejected.

(39) COMMENT: Paragraph (9)(c) is not necessary so long as paragraph (9)(d) requires an addendum. Thus, delete (c).

Response: The department agrees. Paragraph (9)(c) has been deleted.

(40) COMMENT: Subsection (10) should require a summary for each EIS.

RESPONSE: The department agrees. The change has been incorporated. To conform with earlier changes, the language has been changed to indicate that a summary must be prepared for both draft and final EISs.

(41) COMMENT: Include an additional subsection reading as follows: "All matters stated as fact in an EIS must be supported with citations to professionally acceptable documentation. All matters which are not supported with such citations shall be stated as statements of opinion".

RESPONSE: The purpose of the requirement of listing of source material is to provide that the matters of fact in an EIS are supported by documentation. To include a subsection such as this is also to increase possibility for subjective determination as there are no criteria for what is professional or acceptable in this proposal. The objections stated by this commenter may also be addressed and it is the purpose of a review period and comment period for such comments and objections to be addressed and presented to the preparing agency. To add them at this point is to unnecessarily complicate the EIS process. The comment is therefore rejected.

(42) COMMENT: It should be emphasized these are guidelines only and standards of adequacy should be provided.

RESPONSE: The policy of MEPA as set forth in section 75-1-103 provides the guidelines necessary for these rules. This policy has been made part of these rules in Rule I. Except for page limitations, the provisions of this subsection are requirements, not guidelines.

(43) COMMENT: The provision for inclusion of a summary of the adopted or incorporated material should be broadened to allow circulation of the summary when the EIS adopted or incorporated is available at certain listed places.

RESPONSE: The department agrees. Along the same lines, adoption or incorporation by reference does not occur when the text is included. Therefore, the provision for incorporation or adoption by including the full text has been completely eliminated.

RULE VI JOINT ENVIRONMENTAL IMPACT STATEMENTS

(1) COMMENT: In the first sentence of (1), strike "may" put "will" in its place.

RESPONSE: The proposed change appears to be closer to the intent of the legislature in 75-1201(2)(c). The proposed change has been incorporated.

(2) COMMENT: In the first sentence of (2), strike "may" and insert "shall."

RESPONSE: The proposed language would require the lead agency to request participation of other agencies in drafting the EIS. The lead agency may, however, have similar expertise on its own staff and therefore not need to involve other agencies. Of course, consultation with other agencies is required in 75-1-201(3). The proposed change is rejected; however, language indicating that this provision applies to preparation rather than consultation has been added and the subsection has been removed from the joint EIS rule and has been made a separate rule (Rule XII).

(3) COMMENT: In the parenthetical sentence in (3)(c), delete "may" and replace it with "shall."

RESPONSE: The proposed change would require state agencies to engage in joint EISs with federal agencies.

This could result in delays when the federal EIS process takes longer than the state process. Also, this is impossible when the federal process would take longer than the state permitting statute allows. Similarly, joint studies and hearings may not be possible. However, use of the word "may" was not intended to allow agencies to avoid joint preparation where it is possible and advantageous. Therefore, the phrase "shall when pratical and expedient" has been substituted.

(4) COMMENT: At the end of (1) add a sentence requiring agency determination within 15 days or governor determination within 30 days in order to protect the public from inter-agency disputes.

RESPONSE: The department agrees. However, it cannot control the Governor's office by rule. Therefore, only the 15-day requirement has been added.

(5) COMMENT: The mandatory cooperation requirement of (1) and the permissive provision of (2) are inconsistent.

RESPONSE: Subparagraph (1) applies when this agency has jurisdiction over a project. Subparagraph (2) requires only a good faith effort of agencies that have no jurisdiction. Language has been added to (2) to clarify the distinction. See new Rule XII.

Rule VII PREPARATION, CONTENT AND DISTRIBUTION OF A PROGRAMMATIC REVIEW

(1) COMMENT: Include rulemaking within the scope of the programmatic rule.

RESPONSE: The question of EISs on rulemaking is being considered in Rule III. The proposed language therefore has not been incorporated in Rule VII.

(2) COMMENT: The term "major action of state government significantly affecting the human environment" should be defined.

RESPONSE: The term is not defined in MEPA, by the Montana Supreme Court, or in the recently adopted federal CEQ rules. In Rule III, the department lists those actions which definitely are within or without the purview of the

term. This case-by-case determination, due to the many variables involved, has been deemed the best approach. The comment is therefore rejected.

(3) COMMENT: The improved time limits of Rule V (5) should be made to apply to the distribution of programmatic reviews.

RESPONSE: The published draft contained a typographical error. "Rule V (5)" has been changed to "Rule V (4)." Language has been added to clarify that the time limits of Rule V (4) apply to both distribution and comment on programmatic reviews.

(4) COMMENT: Because oftentimes the most important environmental decisions are made at the programmatic or regional level, programmatics or regionals should be mandatory and should address cumulative impacts, impacts common to a series of actions, and the overall impact of the program.

RESPONSE: Programmatics and regionals are often extemely expensive. However, in most instances the fee bill is not applicable. Where there is also no appropriation for preparation of the document, the department cannot prepare such a document. Therefore, the discretionary language has been retained. However, the language describing the contents of the document has been incorporated.

RULE VIII SPECIAL RULES APPLICABLE TO CERTAIN MEPA SITUATIONS

(1) COMMENT: In subsection (1), the word "immediate" should be stricken.

RESPONSE: MEPA requires agency compliance "to the fullest extent possible." Only immediately necessary actions should be exempt from the EIS process. The language has been changed accordingly.

(2) COMMENT: In subsection (2), the confidentiality of proprietary information should be protected.

RESPONSE: There is no legal authority under state law to allow this. The comment is therefore rejected.

(3) COMMENT: In subsection (2), a person should not be required to go to court to establish confidentiality. He should be able to claim it and make the challenger go to court to get the information.

RESPONSE: The whole concept of the public's constitutional right to know is based on p;acing the burden of proving confidentiality on the party claiming it. The comment is rejected.

(4) COMMENT: In subsection (3) it is unclear as to what must be prepared within 45 days.

RESPONSE: The department agrees. Language indicating that the notice must be prepared within 45 days has been added.

(5) COMMENT: Subsection (3) should require that the Environmental Quality Council be notified of any conflicting provisions under any statutory conflicts.

RESPONSE: The department agrees. Appropriate language has been added.

(6) COMMENT: Subsection (4) should require that disclosure of direct financial interests only be made.

RESPONSE: Any financial interest, direct or indirect, could lead to the affects sought to be prohibited. The comment is therefore rejected.

(7) COMMENT: MEPA contains no authorization for subsection (4).

RESPONSE: The authority to ensure that impact statements as prepared by unbiased personnel is implied from the impact statement requirement itself and from Title 2, Chapter 2, Part 1. It should be noted that the federal CEQ rules contain a similar requirement.

RULE IX PUBLIC HEARINGS

(1) COMMENTS: Subsection (2)(c) should be deleted and (a) and (b) should be limited to only those in the immediate area.

RESPONSE: Allowing only those in the immediate area to request a public hearing violates the purpose of MEPA. Inclusion of (2)(c) is consistent with hearing requirements of the APA. The comment is therefore rejected.

(2) COMMENT: The public hearing should be held within 60 days of preparation of the EIS.

RESPONSE: No reason was given for the proposed limitation. The statute under which a permit is issued contains the time frames for agency action on the application. The commment is therefore rejected.

(3) COMMENT: The request for a public hearing should be required to be made within 15 days of the EIS draft.

RESPONSE: The department agrees that a time limit should be set. Fifteen days is too short a time for a complex EIS. A 20 day time limit has been added.

(4) COMMENT: Use of the term "applicant whose project is being evaluated in the EIS' could lead to an interpretation that only EISs on permit applications require hearings.

RESPONSE: Subsection (2) controls when a hearing is required. The comment is therefore rejected.

(5) COMMENT: A scoping process should be included in the rules.

RESPONSE: The concept of scoping requires public input on the adequacy of the EIS before drafting the DEIS. The purpose is to ensure that all issues that the public is concerned about are addressed and to allow those issues about which the public is not concerned to receive less attention. The concept is rejected for several reasons. First, public input is provided for on the DEIS. Scoping hearings might be required 2 or 3 times if the proposal changes in its initial stages, as it frequently does. Second, it is doubtful that a public scoping meeting would result in narrowing of the issues. Third, informal scoping already occurs, even though no formal public hearings are held. For those reasons the comment is rejected.

(6) COMMENT: The agency should be required to advertise the hearing on radio and in the newspaper - once weekly for 3 consecutive weeks before the hearing.

RESPONSE: Often the statutory time frames under which the permit is issued do not allow this long a period for public notice. The department agrees that newspaper and radio notice is beneficial. Therefore, public notice language has been added.

(7) COMMENT: Time limits for comments at the hearing should be set for not more than 3 to 5 minutes.

RESPONSE: The agency should receive the maximum amount of testimony in the time alloted for the hearing. The time allotment for each person must be set by the hearings officer for each hearing, depending on the number of participants. The comment is therefore rejected.

(8) COMMENT: Hearings should be required to be held at a time and place most convenient to the public - not during mid-day.

RESPONSE: While in most instances an evening hearing is preferable to the public, there are exceptions. Hearings officers should be given the discretion to determine the time and place best suited for the hearing. Therefore, a hard and fast rule requiring evening hearings has been rejected.

(9) COMMENT: Both emotional and technical testimony should be considered on the draft - but only non-technical testimony should be taken at the hearing.

RESPONSE: The purpose of the public hearing is to receive public testimony regarding the sufficiency of the EIS. Technical testimony relevant to this issue cannot be excluded. The comment is therefore rejected.

(10) COMMENT: The agency should furnish guidelines to what it wants to hear from the public.

RESPONSE: The department agrees. Language requiring the press release or notice to state what nature of testimony it wishes to receive has been added.

(11) COMMENT: No effected agency representative should be allowed to give testimony from the floor.

RESPONSE: The department agrees that no representative of an agency participating in preparation of the EIS should be allowed to testify. Language to this effect has been added.

(12) COMMENT: A transcript should be furnished to all persons who attend the hearing or request one.

RESPONSE: Transcript preparation is extremely costly and time consuming. The department relies on notes and tapes rather than a transcription. All comments are summarized and responded to in the final EIS, which is available on

APPENDIX "H"

scribed or allowed * * * by any applicable statute, the day of the act * * * after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. * * *"

In accord: *Lewistown Propane Co. v. Utility Builders Inc.*, supra; *Grey v. Silver Bow County*, 149 Mont. 213, 425 P.2d 819.

Hence the State's notice of appeal was timely filed on Monday, July 19. The judgment of the district court is vacated and this cause remanded to the district court of Silver Bow County for trial on the issue of damages.

MR. CHIEF JUSTICE HATFIELD and JUSTICES DALY, JOHN C. HARRISON and SHEA concur.

THE MONTANA WILDERNESS ASSOCIATION, AND GALLATIN SPORTMEN'S ASSOCIATION, INC., PLAINTIFFS AND RESPONDENTS, v. THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA AND THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA, DEFENDANTS AND APPELLANTS, AND BEAVER CREEK SOUTH, INC., A CORPORATION, INTERVENOR AND APPELLANT.

No. 13179.
Submitted Dec. 6, 1976.
Decided Dec. 30, 1976.
559 P.2d 1157.

MUNICIPAL CORPORATIONS — HEALTH AND ENVIRONMENT

1. **Municipal Corporations**
Under the 1973 Subdivision and Platting Act, control of subdivision development is placed in local governmental units in accordance with comprehensive set of social, economic, and environmental criteria and in compliance with detailed procedural requirements. R.C.M.1947, §§ 11-3859 to 11-3876, 11-3863, 69-5001 to 69-5009.

2. **Municipal Corporations**
The 1971 Environmental Policy Act does not extend the control of the Department of Health and Environmental Sciences over subdivisions beyond matters of water supply, sewage and solid waste disposal and does not change the law with regard to statutory right and duty of local governmental units as to subdivision development. R.C.M.1947, §§ 69-6501 to 69-6518, 69-6502, 69-6504, 69-6504(6).

3. **Health and Environment**
Judgment holding that environmental impact statement on proposed subdivision filed by Department of Health and Environmental Sciences was void, ordering reinstatement of prior sanitary restrictions on proposed subdivision and enjoining further development of proposed subdivision until reimposed sanitary restrictions were removed would be reversed; Department's failure to adequately write environmental impact statement had nothing to do with county commission to act on proposed subdivision. R.C.M.1947, §§ 11-3859 to 11-3876, 69-5001 to 69-5009, 69-6501 to 69-6518, 69-6504(b)(1), (b)(3)(i, iii, iv), (b)(4).

4. **Municipal Corporations**
Department of Health and Environmental Sciences may supplement information available to local governing bodies as to proposed subdivision but its only regulatory function is in the statutorily prescribed areas of water supply, sewage and solid waste disposal. R.C.M.1947, §§ 69-6501 to 69-6518, 69-6502, 69-6504, 69-6504(6).

Appeal from the District Court of Lewis and Clark County.

First Judicial District.

Hon. Gordon R. Bennett, Judge presiding.

See **C.J.S.**, Municipal Corporations, § 83.

Nonprofit organizations dedicated to conservation purposes brought action seeking declaratory and injunctive relief against proposed subdivision development. The District Court entered summary judgment that environmental impact statement on proposed subdivision filed by the Department of Health and Environmental Sciences was void, ordered reinstatement of prior sanitary restrictions on proposed subdivision and enjoined further development of proposed subdivision until reimposed sanitary restrictions were removed, and appeal was taken. The Supreme Court, Castles, J., held that the 1971 Environmental Policy Act did not extend the control of the Department over subdivision development beyond matters of water supply, sewage and solid waste disposal; thus Department's failure to adequately write environmental impact statement had nothing to do with authority of county commission to act as to proposed subdivision.

Reversed, complaint dismissed.

Haswell, J., filed a dissenting opinion.

Daly, J., filed a dissenting opinion.

G. Steven Brown, argued, Helena, for defendants and appellants.

Dzivi, Conklin, Johnson & Nybo, William P. Conklin, argued, Great Falls, for intervenor and appellant.

James H. Goetz, argued, Bozeman, for plaintiffs and respondents.

Steven J. Perlmutter, argued, Richard M. Weddle, Helena, Donald R. Marble, Chester, Anderson, Symmes, Forbes, Peete & Brown, Billings, for amicus curiae.

MR. JUSTICE CASTLES delivered the opinion of the Court.

This is an action by the Montana Wilderness Association and the Gallatin Sportsmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district

court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the proposed subdivision was void, (2) ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor, appeal.

The instant appeal is on rehearing and the opinion previously promulgated on July 22, 1976, is withdrawn.

Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the proposed subdivision and has been made a party to the judgment. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae. The Montana Department of Community Affairs appears as amicus curiae. Other amicus curiae appeared by brief.

Beaver Creek South owns a tract of approximately 160 acres adjacent to U.S. Highway 191 in the Gallatin Valley seven miles south of Big Sky of Montana. Early in 1973 Beaver Creek submitted to the Bozeman City-County Planning Board a subdivision plat for approval by that board and the Gallatin County Commissioners, contemplating development of 95 acres of that tract as a planned unit development in two phases. This submission and approval was required by sections 11-3859 through 11-3876, R.C.M.1947, known as the Montana Subdivision and Platting Act. After publication of notice a public hearing was held

on October 11, 1973 where the only public reaction was from the State Department of Fish and Game, expressing concern about possible infringement of wildlife habitat along the highway. Again, on January 10, 1974, a second public hearing was held after notice concerning a second phase of the development was given. At this second hearing, no public comments were received. Approval of the subdivision was recommended and carried out, *subject* to approval of water and sewer systems by the Montana Department of Health and Environmental Sciences as required by sections 69-4801 through 69-4827, R.C.M.1947. The application for this approval had been made by the owner early in 1973 also. At the local level, neither plaintiff appeared at the public hearings.

After several months of conferences and tests the Department issued a draft environmental impact statement on April 8, 1974. The draft statement was issued purportedly because of the requirements of section 69-6504(b)(3), R.C.M.1947, the Montana Environmental Policy Act (MEPA). A final impact statement was issued on June 26, 1974.

On July 26, 1974, the Department issued and delivered to Beaver Creek its certificate removing the sanitary restrictions on the plat.

On that same day, July 26, 1974, after the issuance of the certificate, the Department was served with an order to show cause and a temporary restraining order issued on the basis of this action filed by plaintiffs on July 25, 1974.

Even though it had already lifted the sanitary restrictions before service of the temporary restraining order, the Department chose on July 29, 1974 to rescind and invalidate its earlier certificate. Following this a series of procedural matters were had and the Department undertook to revise its Environmental Impact statement. At this point, the landowner, Beaver Creek, was not a party to the proceedings. It was allowed to intervene in September, 1974. The Gallatin County Board of County Commissioners was never a party to the action.

Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory jdugment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department again conditionally removed the sanitary restrictions on Beaver Creek South.

On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS of the Department was inadequate in law; (2) a permanent injunction prohibiting Beaver Creek from selling any of the lots of further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunction ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic, interdisciplinary approach as required by section 69-6504(b)(1), R.C.M.1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M.1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M.1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental costs and benefits of the alternative actions available.

Defendants and intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975, the district court issued its opinion and declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The single determinative issue here is the function of the Department in land use decisions such as is involved in this case, that is, a simple subdivision plat. Other ancillary issues as to "standing" of the plaintiff associations to sue and the right to injunctive relief have been briefed and argued but need not be determined here because of our view of the law of Montana. It is seen that the district court findings and judgment are premised on the MEPA being the ruling statute; and that the Department of Health is required to file an impact statement; and, further, that the Department has the final land use decision over and

above the water supply, sewage and solid waste disposal issues. Although the district court did not specifically discuss this problem, it can be the only basis for its decision.

In analyzing the law of Montana, three acts of the Montana legislature are involved. The three acts which must be looked to and harmonized are:

(1) The 1967 *Subdivision Sanitation Act*, sections 69-5001 through 5009, R.C.M.1947.

This Act prohibits the recording of any subdivision plat until the Department issues its certificate removing sanitary restrictions from the plat. It is primarily a public health measure and is designed to protect the quality and potability of public water supplies.

(2) The 1971 *Montana Environmental Policy Act*, sections 69-6501 through 6518, R.C.M.1947. This Act declares as its purpose in section 69-6502:

"The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council."

The MEPA then goes on to describe in general terms the environmental impacts that must be assessed when agencies of the state make major decisions having a significant impact on the human environment. Section 69-6504 requires state agencies to prepare detailed statements analyzing the impacts of *major actions of state government* in several categories. In that same section the "responsible state official" shall consult with other state agencies, and, in subdivision (6) provides that state agencies shall:

"make available to counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment".

The MEPA also created a legislative branch entity known as the Environmental Quality Council. This group has been vested with legislative watchdog authority as a sort of legislative auditor within the legislative branch of government. This Act was amended in 1975 so that all voting members of the council are legislative members. The original Act was passed prior to the effective date of the 1972 Montana Constitution.

(3) The 1973 *Subdivision and Platting Act*, sections 11-3859 through 11-3876, R.C.M.1947. This Act confers upon local governing bodies the authority to approve or disapprove a subdivision based on a variety of environmental, economic and social factors (section 11-3863). That section, 11-3863, describes the content of the regulations that must be adopted by every local governing body to insure the "* * * orderly development of their jurisdictional areas * * *." The factors that must be considered include the impact on roads, the need for additional roadways and utility easements, adequate open spaces, water, drainage, sanitation facilities and others, including environmental factors. Also in that section it is provided that the state department of intergovernmental relations shall prescribe reasonable minimum requirements for the local governmental units' regulations which shall include "detailed criteria for the content of the environmental assessment required by the act." Public hearings are required and the local governing body "shall consider all relevant evidence relating to the public health, safety and welfare, including the environmental assessment * * *."

It is also noted that section 69-5001 of the 1967 Subdivision Sanitation Act (also amended in 1973) limited expressly the involvement of the Department to "water supply, sewage disposal, and solid waste disposal".

[1] Further analysis of the 1973 Subdivision and Platting Act will demonstrate unequivocally a legislative intent to place control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic, and

environmental criteria and in compliance with detailed procedural requirements.

[2] Significantly, no similar mandate is given in the 1971 MEPA. Thus we conclude that the district court's reasoning, necessarily implied from its holding, that MEPA extends the Department's control over subdivisions beyond matters of water supply, sewage and solid waste disposal is in error as it is in direct conflict with the legislature's undeniable policy of local control as expressed in the Subdivision and Platting Act.

A further comparison of the local control versus State control over subdivisions is this — the 1973 legislature charged local governing bodies with comprehensive control over subdivision development, and amended that law in 1974 and 1975. If the 1971 MEPA already lodged this control in the state Department, such legislation was superfluous. Also, the express purpose of MEPA set out previously herein states to "encourage", "promote" and "enrich" [understanding]. Nowhere in the MEPA is found any regulatory language.

[3, 4] We refer back to the procedures here. The local governing unit, the Gallatin County Commission, had already complied with the laws. It was not made a party to this action. It had a statutory duty and right to act. The MEPA does not change the law with regard to that. Accordingly the judgment directed to the Department's failure to adequately write an environmental impact statement has nothing to do with the authority of the county commission to act. As to the Department, it of course, can supplement information available to local governing bodies, but its only regulatory function is in the statutorily prescribed areas of water supply, sewage and solid waste disposal.

We have not herein set out the function of the Montana Department of Community Affairs which has submitted a brief amicus curiae. But we do observe that detailed procedures for intergovernmental functions are set out by statutes, regulations, and procedures for protection of the environment.

Finding, as we have, that the regulatory function of subdivisions is local, the judgment and injunctive order of the district court is reversed and the complaint ordered dismissed.

MR. JUSTICE JOHN C. HARRISON and A. B. MARTIN, District Judge, sitting for Chief Justice James T. Harrison, concur.

MR. JUSTICE HASWELL dissenting:

The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control.

This case does not concern local approval of subdivision plats by county commissioners under the Subdivision & Platting Act. Neither the county commissioners nor the city-county planning board is a party to this litigation. Nobody claims that the county commissioners do not have the power of approval of subdivision plats in conformity with the Subdivision & Platting Act. State v. local control is simply a "red herring" in this case.

The real issues in this case concern the right of two essentially local environmental organizations whose members make substantial use of nearby public lands for recreational purposes to compel a state agency to conform to the requirements of the Montana Environmental Policy Act regarding an Environmental Impact Statement to the end that an adequate environmental assessment will be made and considered by the decision makers, be they local or state or whoever they may be. If they cannot, the inalienable right of all persons to a clean and healthful environment guaranteed by Montana's Constitution confers a right without a remedy; the requirements of Montana's Environmental Policy Act and related environmental legislation become meaningless and illusory; and the mandatory Environmental Impact Statement deteriorates into a meaningless gibberish, providing protection to no one. These issues are embodied in the three principal issues raised by the parties, viz. standing, the validity of the Environmental Impact Statement, and injunctive relief.

In my view, the majority neatly sidesteps these real issues in this case. Instead, the majority decision effectively nullifies express state policy on environmental matters contained in the Montana Environmental Policy Act, House Joint Resolution 73 approved March 16, 1974, and substantially interferes with and limits the effective operation of the legislature's Environmental Quality Council.

Because this Court has made a 180° turn from its original position, I set out the original decision of this Court for comparison. I believe the original decision is correct, legally sound, and effectuates the purposes and objective of Montana's Constitution and its statutes relating to the environment.

* * * * * *

This is an action by the Montana Wilderness Association and the Gallatin Sportsmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the porposed subdivision was void, (2) ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor appeal.

Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportsmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the

proposed subdivision. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae.

Beaver Creek South is located in the canyon of the West Gallatin River adjacent to U.S. Highway 191 about seven miles south of Meadow Village of Big Sky of Montana. Beaver Creek crosses a portion of the property for about one-quarter mile along the north side. The general area where the proposed subdivision is located is a scenic mountain canyon area presently utilized as a wildlife habitat and a grazing area for livestock. Beaver Creek supports a salmonoid fishery. A two lane public highway, U.S. 191, runs through the canyon.

The developer Beaver Creek South, Inc., hereinafter called Beaver Creek, intends to subdivide approximately 95 acres into 75 lots for single-family and multi-family residences and a maximum of seven and one-half acres abutting U.S. Highway 191, for a neighborhood commercial area. The development of the subdivision is to be accomplished in two phases.

In 1973 Beaver Creek submitted to the Bozeman City-County Planning Board its subdivision plat contemplating Beaver Creek South for approval by the board and the county commissioners as required by sections 11-3859 through 11-3876, R.C.M.1947, the Montana Subdivision and Platting Act. In the spring of 1974 Beaver Creek filed the subdivision plat and plans and specifications for a water supply and sewer system with the Montana Department of Health and Environmental Sciences (hereinafter called the Department) for review and approval as required by sections 69-5001 through 69-5009, R.C.M.1947, the Sanitation in Subdivisions Act. Section 69-5003(2)(b) provides that a subdivision plat may not be filed with the county clerk and recorder until the Department has certified "that it has approved the plat and plans and specifications and that the subdivision is subject to no sanitary restriction".

In April 1974 the Department circulated a "draft" environmental impact statement on the proposed subdivision in order to

obtain comments on the proposal pursuant to section 69-6504 (b)(3), R.C.M.1947, of the Montana Environmental Policy Act (MEPA). Written comments were received and the Department issued its "final" environmental impact statement in June 1974. The following month plaintiff Associations commenced this action seeking a permanent injunction against the Department's removal of sanitary restrictions on the proposed Beaver Creek South. The Associations alleged failure of compliance with subdivision laws, administrative rules, Environmental Quality Council guidelines, and MEPA. The district court issued a temporary restraining order and an order to show cause. The Department and the Associations entered into a stipulation vacating the show cause hearing and the Department revised its final environmental impact statement, submitting a copy to the district court in October 1974. This revised final environmental impact statement is hereinafter called the revised EIS.

Meanwhile, in September 1974, Beaver Creek was granted leave to intervene. Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory judgment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department conditionally removed the sanitary restrictions on Beaver Creek South.

On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS of the Department was inadequate in law; (2) a permanent injunction prohibiting Beaver Creek from selling any of the lots or further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunc-

tion ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic, interdisciplinary approach as required by section 69-6504(b)(1), R.C.M.1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M.1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M.1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental costs and benefits of the alternative actions available.

Defendants and intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975, the district court issued its opinion and

declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The issues can be summarized in this fashion:

1) Do plaintiff Associations have standing to maintain this action?

2) Does the Revised EIS satisfy the procedural requirements of the Montana Environmental Policy Act (MEPA)?

3) Are plaintiff Associations entitled to injunctive relief?

Appellants challenge the standing of the Associations to bring this suit. Appellants' arguments fall into three main categories: a) that the Associations have suffered no cognizable injury; b) that any injury suffered or threatened is indistinguishable from the injury to the public generally; and c) that neither MEPA, the Montana Administrative Procedure Act, nor any other statute grants standing to these Associations to sue agencies of the state.

Initially, the question of environmental standing under MEPA is one of first impression in Montana. Therefore, the Associations and amicus curiae have presented this Court with numerous authorities from other jurisdictions on the issue of environmental standing. We find none are controlling as to the question before us, but a brief review of such authorities aids in the illumination of the determinative factors regarding this issue.

The Associations urge this Court to adopt the rationale of the federal courts in finding environmental standing because the relevant portions of MEPA in issue here are patterned virtually verbatim after corresponding portions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 through 4347, (NEPA).

In the federal courts, citizen challenges to alleged illegal agency action are often brought pursuant to the federal Administrative Procedure Act, 5 U.S.C. §§ 701 through 706. The companion cases of *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, 188; and *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), established the federal two-pronged test for standing to sue administrative agencies. The United States Supreme Court held that persons have standing to obtain judicial review of federal agency action under the federal Administrative Procedure Act where they allege that the challenged action causes them injury in fact and where the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies are claimed to have violated.

Data Processing and *Barlow* did not concern environmental matters, but such a case was presented in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, 641 (1972). In *Sierra Club*, a conservation organization alleged its "special interest" in conservation and sound management of public lands, and sued the Secretary of the Interior for declaratory and injunctive relief against the granting of approval or issuance of permits for commercial exploitation of a national game refuge area in California. Petitioner invoked the judicial review provisions of the federal Administrative Procedure Act. The Supreme Court commenced its discussion of standing with this statement:

"* * * Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947, 962. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

The Supreme Court held that petitioner lacked standing solely because it did not sufficiently allege "injury in fact" to its "individualized interests", that is, its individual members. Thus the Court did not reach the question of whether petitioner satisfied the "zone of interest" test.

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254, 269 (1973), proceedings were brought against the Interstate Commerce Commission (ICC) to enjoin the enforcement of certain administrative orders. Plaintiff organization alleged injury in that each of its members used the natural resources in the area of their legal residences for camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes. The alleged illegal activity was that the ICC failed to include with its orders a detailed environmental impact statement as required by NEPA. The Court found the allegations of the complaint with respect to standing were sufficient to withstand a motion to dismiss in the district court. The Court also reiterated from *Sierra Club* that "injury in fact" is not confined to economic harm:

"* * * Rather, we explained [in *Sierra Club*]: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients in the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' * * Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing."

It was undisputed that the "environmental interests" asserted by plaintiff were within the "zone of interests" to be protected or regulated by NEPA, the statute claimed to have been violated.

Sierra Club and *SCRAP* underscore the fact that in the federal courts environmental standing has developed in the statutory context of the federal Administrative Procedure Act.

The lower federal courts have, of course, followed the "injury in fact" and "zone of interest" test. For example, in the Ninth Circuit Court: *National Forest Preservation Group v. Butz*, 485 F.2d 408 (9 Cir., 1973); *Cady v. Morton*, 8 ERC 1097, 527 F.2d 786 (9 Cir., 1975); *City of Davis v. Coleman*, 521 F.2d 661 (9 Cir.; 1975).

Here, the Associations also cite several cases from California and Washington in support of their standing argument. The experience in the state of Washington has some pertinence to our inquiry. Washington's State Environmental Policy Act, Washington Revised Code, Ch. 43.21C (1974) (SEPA), is also modeled after NEPA and has been interpreted by the Washington courts in several cases. The leading case as to standing is *Leschi Improvement Council v. Washington State Highway Commission*, 84 Wash.2d 271, 525 P.2d 774, 786 (1974). Washington's SEPA, like MEPA, contains no express provision for judicial review at the behest of private parties. In *Leschi* petitioners obtained review of a state highway commission's limited access and design hearings and of the commission's environmental impact statement, not pursuant to any statutory grant of standing, but by way of certiorari in the state's lower court. Petitioners also sought an injunction. The Washington Supreme Court held the petitioners had standing because they raised the question of whether a nonjudicial administrative agency committed an illegal act violative of fundamental rights. An illegal act was said to be one which is contrary to statutory authority. More important, the court held that petitioners sufficiently alleged violation of a fundamental right because of the language in SEPA that each person has a "fundamental and inalienable right to a healthful environment." Washington Revised Code § 43.21C.020(3). This section schematically corresponds to MEPA section 69-6503(b), which recognizes that "each person shall be entitled to a healthful environment * * *."

In *Leschi* four justices dissented. They objected to the standing of petitioners because:

"* * * Judicial review of the administrative proceeding involved, at the instance of persons standing in the position of the appellants, is not authorized by any statute or any doctrine of common law, and *there is no suggestion that it is mandated by any provision of the state or federal constitutions.*" (Emphasis supplied.)

Here, appellants suggest this Court follow certain Montana cases in denying standing on the ground that the Associations lack standing *to enjoin* public officers from acting. This argument fails to distinguish between the separate questions of standing and of injunctive relief. The particular issue of injunctions will be treated separately hereinafter.

In Montana, the question of standing to sue government agencies has arisen in the context of taxpayer and elector suits. *State ex rel. Mitchell v. District Court*, 128 Mont. 325, 339, 275 P.2d 642, 649, involved a complaint seeking to enjoin the secretary of state from certifying nominees for election to a certain office. This Court said:

"The complaint which the plaintiff * * * filed in the district court shows that his only interest is as a taxpaying, private citizen and prospective absentee voter. It wholly fails to show that he will be *injured in any property or civil right.* Thus does [his] own pleading show him to be without standing or capacity to invoke equitable cognizance of a purely political question * * *." (Emphasis supplied.)

Holtz v. Babcock, 143 Mont. 341, 380, 390 P.2d 801, 805, was an action to enjoin the governor and other state officers from performing an agreement regarding an airplane lease. It was held that plaintiff lacked standing to sue as a citizen, resi-

dent, taxpayer and airplane owner. On petition for rehearing the Court stated:

"* * * The only complaint a taxpayer can have is when [the alleged state action] affects his pocketbook by unlawfully increasing his taxes. Appellant here does not allege *any particular injury which he personally would suffer.*" (Emphasis supplied.)

In *State ex rel. Conrad v. Managhan*, 157 Mont. 335, 338, 485 P.2d 948, 950, the Court summarily stated:

"* * * We hold that relators *as affected taxpayers*, have standing to bring a declaratory judgment action [against county assessors and the state board of equalization] concerning a tax controversy * * *." (Emphasis supplied.)

Chovanak v. Matthews, 120 Mont. 520, 525-527, 188 P.2d 582, 584-585, concerns an attack against the constitutionality of a statute rather than a challenge to particular agency action. However, we look to *Chovanak* for its general discussion of the principles of standing. There the plaintiff sued the state board of equalization for a declaratory judgment that a slot machine licensing act was constitutionally void. Plaintiff alleged he was a resident, citizen, taxpayer and elector of the county where the action was commenced. We quote *Chovanak* for the sound rules of jurisprudence enunciated:

"It is by reason of the fact that it is only judicial power that the courts possess, that they are not permitted to decide mere differences of opinion between citizens, or between citizens and the state, or the administrative officials of the state, as to the validity of statutes. * * *

"* * * The judicial power vested in the district courts and the Supreme Court of Montana, by the provisions of the Montana Constitution extend to such 'cases at law and in equity' as are within the judicial cognizance of the state sovereignty. Article 8, secs. 3, 11. By 'cases' and 'controversies' within the judicial power to determine, is meant real controversies and not abstract differences of opinion or moot questions. Neither federal nor state Constitution has granted such power.

"* * *

"The only interest of the appellant in the premises appears to be that he is a resident, citizen, taxpayer and elector of the county * * *. He asserts no legal right of his that the said board has denied him, and sets forth no wrong which they have done to him, or threatened to inflict upon him.

"Appellant's complaint is in truth against the law, not against the board of equalization. He represents no organization that has been denied a slot machine license. He seeks no license for himself. In fact it appears from his complaint that slot machines, licensed or unlicensed, are utterly anathema to him. There is no controversy between him and the board of equalization.

"* * *

"It is held in Montana, as it is held in the United States Supreme Court, and by courts throughout the nation, that a showing only of such interest in the subject of the suit as the public generally has is not sufficient to warrant the exercise of judicial power. * * *"

It is clear from these Montana cases that the following factors constitute sufficient minimum criteria, as set forth in a complaint, to establish standing to sue the state:

1) The complaining party must clearly allege past, present or threatened injury to a property or civil right.

2) The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

3) The issue must represent a "case" or "controversy" as is within the judicial cognizance of the state sovereignty.

With the foregoing criteria in mind, we hold plaintiff Associations have standing to seek judicial review of the Department's actions under MEPA.

First, the complaint alleges a threatened injury to a civil right of the Associations' members, that is, the "inalienable * * * right to a clean and healthful environment", Article II, Section 3,

1972 Montana Constitution. This constitutional provision, enacted in recognition of the fact that Montana citizens' right to a clean and healthful environment is on a parity with more traditional inalienable rights, certainly places the issue of unlawful environmental degradation within the judicial cognizance.

We have studied appellants' arguments that Article IX, Section 1, 1972 Montana Constitution, states that the legislature shall provide for the enforcement of the state's duty to "maintain and improve a clean and healthful environment in Montana", and the legislature shall provide for "adequate remedies" to protect it. We have studied the Constitutional Convention minutes surrounding Article IX and are aware the intent of the delegation was for the legislature to act pursuant to Article IX. But, we cannot ignore the bare fact that the legislature has not given effect to the Article IX, Section 1 mandate over a period of years. Moreover, the declaration of rights in Article II, the Article dealing with citizens' fundamental rights, gives "All persons" in Montana a sufficient interest in the Montana environment to enable them to bring an action based on those rights, provided they satisfy the other criteria set forth.

Intervenors urge this Court to consider the lengthy dissent in the Washington *Leschi* case as persuasive authority that the plaintiff Associations lack standing. The portion of that dissent relied upon, deals with the proposition the petitioners there came under no statutory grant of standing and were therefore excluded from the courts in a SEPA case. However, that dissent actually supports our holding here. The dissent assails the purported *statutory* creation of a "fundamental right" in SEPA upon which standing may be founded, and argues that a fundamental right can only be derived from the fundamental law. We concur and find an inalienable, or fundamental, right was created in our fundamental law, Article II, Section 3, 1972 Montana Constitution.

Second, the complaint alleges on its face an injury to the Associations which is distinguishable from the injury to the general

public. When the plaintiffs do not rely on any statutory grant of standing, as here, courts must look to the nature of the interests of plaintiffs to determine whether plaintiffs are in a position to represent a "personal stake in the outcome of the controversy" ensuring an "adversary context" for judicial review. *Sierra Club v. Morton*, supra; *Chovanak v. Matthews*, supra. Both Associations allege, in effect, that they are relatively large, permanent, nonprofit corporations dedicated to the preservation and enhancement of wilderness, natural resources, wildlife and associated concerns. Both Associations allege substantial use of the public lands adjacent to Beaver Creek South by their members for various recreational purposes. The Gallatin Sportsmen's Association contributed to the Department's Revised EIS by way of written comments to the draft environmental impact statement. These facts are sufficient to permit the Associations to complain of alleged illegal state action resulting in damage to the environment.

Third, there can be no doubt that unlawful environmental degradation is within the judicial cognizance of the state sovereignty. The constitutional provisions heretofore discussed and MEPA itself unequivocally demonstrate the state's recognition of environmental rights and duties in Montana. The courts of the state are open to every person for the remedy of lawfully cognizable injuries. Article II, Section 16, 1972 Montana Constitution; Section 93-2203, R.C.M.1947.

Finally, we reiterate these Associations are citizen groups seeking to compel a state agency to perform its duties according to law. This concept is novel in Montana only insofar as it is raised here in the context of the state's explicit environmental policy. Were the Associations denied access to the courts for the purpose of raising the issue of illegal state action under MEPA, the foregoing constitutional provisions and MEPA would be rendered useless verbiage, stating rights without remedies, and leaving the state with no checks on its powers and duties under that act. The statutory functions of state agencies under MEPA can-

not be left unchecked simply because the potential mischief of agency default in its duties may affect the interests of citizens without the Associations' membership. *United States v. SCRAP*, supra.

The second major issue concerns the adequacy of the Revised EIS filed by the Department on the Beaver Creek South subdivision.

Throughout the argument Beaver Creek has maintained that MEPA has no bearing upon the Department's review of the proposed subdivision plant and an environmental impact statement is not required. If such statement is required, then Beaver Creek allies itself with the Department's position. The Department concedes that an environmental impact statement is required, but contends its responsibilities under MEPA are circumscribed by other statutory authority. In both Beaver Creek's and the Department's arguments, the thrust is that subdivision review has been comprehensively provided for in two acts hereinbefore cited: the Subdivision and Platting Act and the Sanitation in Subdivisions Act. They allege the clear legislative intent of the Subdivision and Platting Act is to place final subdivision approval authority in the hands of local government (e.g., section 11-3866, R.C.M.1947), and the Department can interfere with town, city, or county subdivision approval only to the extent of its particular expertise and authority under the Sanitation In Subdivisions Act. Thus, they allege, if a Department environmental impact statement is required, it need deal in detail only with the environmental effects related to water supply, sewage disposal, and solid waste disposal.

Montana's Environmental Policy Act was enacted in 1971 and is patterned after the National Environmental Policy Act. It is a broadly worded policy enactment in response to growing public concern over the innumerable forms of environmental degradation occurring in modern society. The first two sections of MEPA state:

"69-6502. Purpose of act. The purpose of this act is to declare

a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council."

"69-6503. Declaration of state policy for the environment. The legislative assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urganization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in co-operation with the federal government and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.

"(a) In order to carry out the policy set forth in this act, it is the continuing responsibility of the state of Montana to use all practicable means, consistent with other essential considerations of state policy, to improve and co-ordinate state plans, functions, programs, and resources to the end that the state may —

"(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

"(2) assure for all Montanans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environ-

ment without degradation, risk to health or safety, or other undesirable or unintended consequences;

"(4) preserve important historic, cultural, and natural aspects of our unique heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

"(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

"(b) The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

These sections unequivocably express the intent of the Montana legislature regarding environmental policy.

But MEPA does more than express lofty policies which want for any means of legislative or agency implementation. Section 69-6504, R.C.M.1947, contains "General directions to state agencies" and provides:

"The legislative assembly authorizes and directs that to the fullest extent possible.

"(a) The policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and

"(b) all agencies of the state shall

"(1) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

"(2) identify and develop methods and procedures, which will insure that presently unquantified environmental amenities and

values may be given appropriate consideration in decision making along with economic and technical considerations;

"(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on —

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the environmental quality council and to the public, and shall accompany the proposal through the existing agency review processes. * * *"

The "detailed statement" described by subsection (b)(3) is referred to as the environmental impact statement, or EIS.

Appellants emphasize that the Subdivision and Platting Act was passed two years after MEPA, and this circumstance expresses a legislative intent that local review of environmental factors, particularly under sections 11-3863 and 11-3866, R.C.M.1947, obviates the necessity for departmental review. Such an interpretation, however, conflicts with the terms of MEPA, in section 69-6507, R.C.M.1947:

"The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state."

Had the legislature intended local review to replace the rigorous review required by responsible state agencies, it could easily have so stated. The existing statutes evince a legislative intent that subdivision decisions be made at the local planning level based upon factors with an essentially local impact, and that state involvement triggers a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance.

An illustration of this interpretation is provided by a comparison of the provisions of MEPA, hereinbefore set forth, with certain provisions of the Subdivision and Platting Act. The statement of policy in the Subdivision and Platting Act contains a mandate to "require development in harmony with the natural environment", section 11-3860, R.C.M.1947. Section 11-3863 (1), R.C.M.1947, requires local governing bodies to adopt regulations and enforcement measures for, inter alia, "the avoidance of subdivision which would involve unnecessary environmental degradation * * *." Subsection (2) requires the department of community affairs to prescribe minimum requirements for local government subdivision regulations, including "criteria for the content of the environmental assessment required by this act." Subsection (3) provides that this "environmental assessment" must be submitted to the governing body by the subdivider. Subsection (4) describes the environmental assessment which emphasizes research as to water, sewage, soil and local services. While these factors may be among the more significant immediate environmental problems created by a subdivision, an assessment of them does not approach the scope of the inquiry required by MEPA section 69-6504, R.C.M.1947.

Furthermore, there is no irreconcilable repugnancy between these acts which would render either the Subdivision and Platting Act or MEPA a nullity. It is suggested the district court's

judgment leads to the proposition that the Department could "veto" a local subdivision approval solely on the basis of its EIS — in direct contravention of the intent of the Subdivision and Platting Act. While this "veto" prospect is feasible, two points are disregarded by the argument. First, MEPA was enacted to mitigate environmental degradation "to the fullest extent possible". Second, MEPA does not call for a halt to all further development; its express direction to agencies is to "utilize a systematic, interdisciplinary approach" to foster sound environmental planning and decision making. A state agency acting pursuant to this directive does not invoke the specter of state government vetoing viable local decisions. The concurrent functions of local and state governments with respect to environmental decisions serve to enhance the environmental policy expressed in all of the statutes here considered, that action be taken only upon the basis of well-informed decisions.

Thus, the statutes must be read together as creating a complementary scheme of environmental protection. As stated in *Fletcher v. Paige*, 124 Mont. 114, 119, 220 P.2d 484, 486:

"The general rule is that for a subsequent statute to repeal a former statute by implication, the previous statute must be wholly inconsistent and incompatible with it. *United States v. 196 Buffalo Robes*, 1 Mont. 489, approved in *London Guaranty & Accident Co. v. Industrial Accident Board*, 82 Mont. 304, 309, 266 P. 1103, 1105. The court in the latter case continued: 'The presumption is that the Legislature passes a law with deliberation and with a full knowledge of all existing ones on the same subject, and does not intend to interfere with or abrogate a former law relating to the same matter unless the repugnancy between the two is irreconcilable.' "

See: *City of Billings v. Smith*, 158 Mont. 197, 490 P.2d 221; *State ex rel. Esgar v. District Court*, 56 Mont. 464, 185 P. 157.

Support for our interpretation of the scope of MEPA is found in a leading federal case interpreting the NEPA. In *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic*

Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1112, 17 A.L.R.Fed. 1 (1971), regulations proposed by the Atomic Energy Commission (AEC) were challenged on the basis that the proposed regulations did not adequately provide for consideration of all environmental factors as mandated by NEPA. The AEC argued that its authority extended only to nuclear related matters and that it was prohibited from independently evaluating and balancing environmental factors which were considered and certified by other federal agencies. The *Calvert Cliffs'* court found the AEC's interpretation of NEPA unduly restricted, stating:

"NEPA * * * makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account."

The district court was correct in treating MEPA as the controlling statute in this case.

The district court held the Revised EIS does not comply procedurally with MEPA on eight separate grounds. The court expressly declined to venture into a review of the substantive merits of the Department's reasoning and conclusions.

A preliminary question is the inquiry into the proper scope of review of the Revised EIS by the courts. Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA. This Court follows the rule found in *Ancient Order of Hiberians v. Sparrow*, 29 Mont. 132, 135, 74 P. 197, 198:

" '* * * that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and * * * only strong reasons will warrant a departure from it.' "

Again, in *State v. King Colony Ranch*, 137 Mont. 145, 151, 350 P.2d 841, 844:

"The State Board of Equalization was and is warranted in following the Federal interpretation of the language which the Legislature of this state adopted from the Act of Congress."

See: *Cahill-Mooney Construction Co. v. Ayres*, 140 Mont. 464, 373 P.2d 703; *Roberts v. Roberts*, 135 Mont. 149, 338 P.2d 719; *Lowe v. Root*, 166 Mont. 150, 531 P.2d 674.

In determining the proper scope of judicial review of environmental impact statements under NEPA, the federal courts have framed the question in terms of whether NEPA is merely a procedural statute or whether it is a substantive statute creating substantive duties reviewable by the courts. See Note: The Least Adverse Alternative Approach to Substantive Review under NEPA, 88 Harvard Law Review 735 (1975). However because the district court ruled on procedural grounds, we limit our inquiry to procedural matters.

The United States Supreme Court recently stated in *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 95 S.Ct. 2336, 2355, 45 L.Ed.2d 191, 215 (1975):

"* * * NEPA does create a discreet procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions * * *."

In *Calvert Cliffs'*, supra, (449 F.2d 1109, 1115), the District of Columbia Court of Appeals stated:

"* * * But if the decision was reached procedurally without individualized consideration and balancing of environmental factors — conducted fully and in good faith — it is the responsibility of the courts to reverse. * * *"

The Ninth Circuit Court of Appeals firmly bases its reviewing standard on the federal Administrative Procedure Act. *Lathan v. Brinegar*, 9 Cir., 506 F.2d 677 (1974); *Cady v. Morton*, 9 Cir., 527 F.2d 786 (1975); *Trout Unlimited v. Morton*, 9 Cir., 509

F.2d 1276, 1282, 1283 (1974). In *Trout Unlimited* the court expanded on its explanation:

"The 'without observance of procedure required by law' § 706(2)(D) standard, however, is less helpful in reviewing the sufficiency of an EIS than one might wish * * *

"* * *

"It follows, therefore, that in determining whether the appellees prepared an adequate EIS we will be guided in large part by 'procedural rules' rooted in case law. * * * All such rules should be designed so as to assure that the EIS serves substantially the two basic purposes for which it was designed. That is, in our opinion an EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decisionmakers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."

We are also mindful that the policies set forth in section 69-6503, R.C.M.1947, are to be implemented by state agencies in accordance with sections 69-6504(a) and 69-6507, R.C.M.1947.

In light of the foregoing, the scope of judicial review of the Revised EIS in this case is limited to a consideration of whether the Department provided a sufficiently detailed consideration and balancing of environmental factors which will ensure that the procedure followed will give effect to the policies of MEPA, aid the Department in decision making, and publicize the environmental impact of its action.

We will consider each factor of the Revised EIS found legally deficient by the district court in the sequence set forth in its opinion.

The district court held the Department failed to include in the Revised EIS anything rising to the dignity of an economic analysis, as required by MEPA and by House Joint Resolution No. 73,

approved March 16, 1974. A joint resolution is not binding as law on this Court, but we give it consideration as a clear manifestation of the legislative construction of MEPA. *State v. Toomey*, 135 Mont. 35, 335 P.2d 1051; *State ex rel. Jones v. Erickson*, 75 Mont. 429, 244 P. 287. House Joint Resolution No. 73 states in relevant part:

"WHEREAS, it is a matter of serious concern to the legislature that this enactment [MEPA] be fully implemented in all respects,

"NOW, THEREFORE, BE IT RESOLVED * * *

"That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 * * * and

"* * * that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects * * *."

With the exception of a discussion of educational costs, the Revised EIS contains scant economic analysis. The Department seeks to explain this away with a reference to the function of local governing bodies in compiling economic data, and states it would be a duplication of effort for the Department to so engage itself. Earlier in this opinion we discussed this attempt to circumvent the intent of MEPA as expressed by the legislature — in this instance as recently as 1974. The Department may not abdicate its duties under MEPA to local governments.

The cost-benefit analysis required by MEPA, as construed by the legislature, encompasses a broad consideration of several factors categorized in House Joint Resolution No. 73, approved March 16, 1974. A reasonable cost-benefit economic analysis undertaken pursuant to these criteria would, in effect, accomplish most of the purposes sought to be served by an environ-

mental impact statement. Here, for example, the Revised EIS asserts that Beaver Creek South will provide necessary housing for many employees at nearby Big Sky of Montana. This comment, however, is not accompanied by any data to support the conclusion that Big Sky employees could afford, or would desire, to live at Beaver Creek South. In other words, the Revised EIS does not consider or disclose the approximate costs of the residential units, the average incomes of Big Sky employees, or even the likelihood that this projected housing use will come to pass. Such data is contemplated by MEPA.

The Department clearly ignored its duties to provide an economic analysis in its Revised EIS, as the district court found. Also the cooperative inter- and intra-governmental approach fostered by MEPA section 69-6503, R.C.M.1947, should encourage the free exchange of data compiled by local and state agencies; if the local government prepares an economic analysis, such could be incorporated as part of the Department's environmental impact statement.

The gist of the Revised EIS, p. 23, with respect to aesthetic considerations is demonstrated by its comments on visual impact:

"A visual impact would certainly result from the proposed development. The severity of this visual impact is purely speculation, and the desirability is a matter of personal aesthetic values.

"* * *

"* * * Any development, including the proposed Beaver Creek South, placed within this scenic canyon setting would be considered aesthetically offensive by a majority of people."

Again, the Revised EIS, p. 24, affirms that visual impact is a matter of "speculation" because "Economists have not developed an acceptable process to place an economic valuation on such intangibles as aesthetics."

This latter comment betrays a fundamental weakness of the Department's approach to its responsibilities under MEPA. In

decrying the absence of a precise quantitative or qualitative measure, the Department ignores the recognition of this variable factor in section 69-6504(b)(2), as one which must "be given *appropriate consideration* in decision making along with economic and technical considerations". (Emphasis supplied). Under section 69-6504(b)(3)(i), the Department is required to prepare a detailed statement on "the environmental impact of the proposed action" and visual impact falls within the meaning of this subsection. There is no detailed description of the design of the proposed residential units, the compatibility of the architecture with the surrounding landscape, the obstruction or availability of views, or the relationship of the open spaces to these factors. The Revised EIS comments in this regard are not sufficiently detailed under any standard conceivable to give meaning to the act or inform decision makers and the public of the probable aesthetic consequences of the development.

Section 69-6504(b)(3)(iii), R.C.M.1947, requires an environmental impact statement to contain "alternatives to the proposed action". Section 69-6504(b)(4), R.C.M.1947, requires agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources". The latter section appears to be operable whether or not an environmental impact statement is prepared. *Trinity Episcopal School Corporation v. Romney*, 8 ERC 1033, 523 F.2d 88, (2d Cir. 1975). The district court correctly concluded the subsection (b)(4) description is to be included in a subsection (b)(3) environmental impact statement.

However, the district court erred in its opinion that discussion of alternatives in the Revised EIS is "patently inadequate". The district court merely viewed the last two pages of the Revised EIS under the "Alternatives" heading, wherein various alternatives are essentially stated as conclusions. This review ignores the reasonable discussion of alternatives contained in other portions of the Revised EIS regarding such factors as water supply,

wastewater, and police and fire protection. As stated by the Ninth Circuit Court of Appeals in *Life of the Land v. Brinegar*, 9 Cir., 485 F.2d 460, 472 (1973):

"NEPA's 'alternatives' discussion is subject to a construction of reasonableness. * * * Certainly, the statute should not be employed as a crutch for chronic fault-finding. Acordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."

The discussion of alternatives in the Revised EIS viewed in its entirety is sufficiently detailed to comply with the procedural requirements of MEPA.

The Revised EIS contains reproductions of lengthy comments from the state Department of Fish and Game and the Gallatin Sportsmen's Association regarding impact of the proposed development on wildlife in the Gallatin Canyon. Other comments are also mentioned. *All* of the comments indicated that an adverse environmental effect on wildlife could not be avoided if the proposal were to be implemented. Section 69-6504(b)(3)(ii), R.C.M.1947. The Revised EIS, p. 28, rather than dealing with a consideration of these adverse effects, contains a protracted discussion of the legislative history of the Subdivision and Platting Act and the local level hearings on the instant plat proposal, and concludes by stating:

"Therefore, there is an opportunity to effect rejection or revision of a subdivision for environmental reasons at the county level. This would appear to satisfy the spirit in which the Montana Environmental Policy Act was enacted."

We find this justification for inaction and ad hoc agency "legislating" to be inappropriate in an environmental impact statement. The Department's responsibility in pursuing its duties under MEPA is to *consider* all relevant environmental values along with other factors and come to a conclusion with regard to them. Although we do not suggest the Department has the internal resources and expertise with which to expand upon or refute the wildlife comments received from outside sources, we do hold it is within the Department's province under MEPA to reach its decision based upon a procedure which encompasses a consideration and balancing of environmental factors. The district court was correct in holding that the mere transmittal of comments adverse to the proposal is insufficient.

The department of Highways commented on the effect of the proposed subdivision with respect to traffic flow on U.S. Highway 191. The Department of Highways states the Beaver Creek South Subdivision "will generate a large amount of traffic", citing figures, and states this increased volume "will not warrant the construction of a four lane facility in this vicinity." Several challenging comments call for more detailed and accurate information, but the Revised EIS, at p. 33, states the Department of Highways reaffirms its statement and on that basis says:

"* * * Beaver Creek South would not be the development that would make reconstruction [of the highway] necessary."

The district court found this portion of the Revised EIS lacking because the treatment of highways was "incomplete", there was no discussion of the effect of future highway construction, and also no discussion of cumulative social, economic and environmental impacts of continued development in the Gallatin Canyon.

We believe the highway discussion is procedurally adequate and that the district court's opinion on this point requires an unwarranted clairvoyance on the part of the Department. In contradistinction to the wildlife discussion where the agency with the greatest expertise in the field (Department of Fish and Game) raised serious adverse questions which were not addressed, here the Department is justified in relying on the Department of Highways projections for future traffic flow. The published comments and accompanying discussion demonstrate a reasonable consideration and balancing of environmental factors.

Comments of Montana Power Company in the Revised EIS

indicate to the Department that the company would have "no problem" in supplying the electricity needs of the proposed subdivision, and that this capacity could be met with present transmission lines. The Revised EIS notes at p. 36, that the proposed subdivision "would be a contributing factor toward any future necessity for additional service." The adverse comments to this in the Revised EIS concentrate on the issue of whether or not Montana Power Company is counting on the use of a proposed new power line into the canyon from the west. The Department's conclusion does not dispute the information provided it by the power company. The district court held that this analysis is superficial at best.

The energy needs of the Gallatin Canyon with respect to Beaver Creek South, and future development, are sufficiently considered and balanced in the Revised EIS. The Department, through its inclusion in the Revised EIS of conflicting comments, cannot be expected to provide detail beyond that which is reasonably foreseeable. The Department reasonably concluded the proposed development would contribute to the total power needs of the area and to any future necessity for additional service. This constitutes procedural compliance with MEPA in that the Departmental decision makers are made aware of the environmental consequences regarding energy, and the same information is made available to other branches of government and the public. *Trout Unlimited v. Morton*, 509 F.2d 1276.

The district court held that the "actual necessity" for the proposed subdivision must be analyzed. As the appellants correctly point out, there is no provision in MEPA which requires a study of necessity. Therefore, the district court's opinion on this point is erroneous.

We point out, however, the necessity of the project was gratuitously introduced into the Revised EIS by the Department in order to publish therein a letter by Big Sky of Montana, Inc. which suggests that the Beaver Creek South subdivision will alleviate a housing shortage for employees at Big Sky. In response to several challenging comments received by the Department, the Revised EIS then reverses its earlier position by stating that the objections may be valid, but they have no bearing on whether or not to approve the plat.

This turnabout of the Department within the Revised EIS evidences an attitude that an environmental impact statement is simply window dressing to pacify opponents of the Department's actions. MEPA was not enacted to provide the government and public with project justifications by state agencies. We hold that if the Department deems the necessity of the development to be a critical factor in its analysis of the impact of the proposed subdivision, then it is bound at least to make a reasonable consideration of the necessity of the project in light of the reasonable objections made to the necessity premise.

The district court held that cumulative impacts must be discussed in greater detail. The Revised EIS contains a detailed analysis of the cumulative impact of increasing the nutrient load in the Gallatin River from the subdivision's domestic water sources. No other cumulative impacts are discussed in the same portion of the Revised EIS. However, the Revised EIS as a whole contains several references to anticipated future environmental impacts in the vicinity, and a reasonably detailed summary of the pending comprehensive plan for the Gallatin Canyon Planning Study Committee. This constitutes a sufficiently detailed consideration and disclosure regarding "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity". Section 69-6504(b)(3)(iv), R.C.M.1947.

In summary, the Revised EIS is procedurally inadequate in its analyses of economic costs and benefits, aesthetic considerations, and wildlife factors. This holding is not to be construed as a mandate for technical perfection; rather, we find simply that the Revised EIS does not sufficiently consider and balance the full range of environmental factors required under the terms of MEPA. If the policy and purpose of MEPA are to have any

practical meaning, state agencies must perform their duties pursuant to the directives contained in that Act.

Having found that the district court correctly declared the Revised EIS to be procedurally inadequate and void, the final question is whether plaintiff Associations are entitled to injunctive relief as ordered by the district court.

The rule is well settled that injunction actions by private parties against public officials must be based upon irreparable injury and a clear showing of illegality. *State ex rel. Keast v. Krieg*, 145 Mont. 521, 402 P.2d 405. Environmental damage as alleged by the Associations is an injury within the scope of the judicial cognizance. Furthermore, the preceding discussion indicates the Revised EIS does not meet the minimum requirements of the law under MEPA and is clearly illegal.

The Department and Beaver Creek allege an injunction is barred by section 93-4203(4), R.C.M.1947, which states:

"An injunction cannot be granted:

"* * *

"(4) To prevent the execution of a public statute, by officers of the law, for the public benefit."

This argument overlooks the cases which hold that illegal actions by public officials may be enjoined. In *Larson v. The State of Montana and the Department of Revenue*, 166 Mont. 449, 534 P.2d 854, 32 St.Rep. 377, 384, this Court overruled the dicta in *Keast* to the effect than an injunction against public officers was banned by section 93-4203(4), stating:

"The preferable law is enunciated in *Hames v. City of Polson*, 123 Mont. 469, 479, 215 P.2d 950, where it was held: " '* * * public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public, or to the injury of individual rights * * *.' "

We affirm the district court holding that injunctive relief is proper in this case.

The summary judgment is affirmed.

MR. JUSTICE DALY dissenting:

Time being short and to preclude another opinion I again dissent and comment that my original objection to legal principles concerning standing to bring suit have not been discussed nor answered.

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TO: ENVIRONMENTAL QUALITY COUNCIL JULY 13, 1981

FROM: DEBORAH B. SCHMIDT, ACTING EXECUTIVE DIRECTOR DBS

RE: LEGISLATIVE HISTORY OF THE MONTANA ENVIRONMENTAL POLICY ACT AND THE ENVIRONMENTAL QUALITY COUNCIL

Born of the fledgling environmental movement christened on the first Earth Day in April, 1970, the Montana Environmental Policy Act took its place as foremost of a series of examples of increased environmental awareness on the part of the 1971 Montana Legislature. While other legislative measures focused on specific, single, environmental issues, MEPA addressed the entire range of environmental concerns and directed an integration and coordination of the various other environmental policies, programs, and responsibilities.

Patterned closely after the National Environmental Policy Act enacted in 1969, MEPA includes three distinct parts: the first establishes a policy for "a productive and enjoyable harmony between man and his environment" and requires state government to coordinate state plans, functions, and resources to achieve various environmental, economic, and social goals. It also establishes (even before the 1972 Constitution) that each person is entitled to a healthful environment and has a responsibility to enhance and preserve the environment. The second part sets out requirements for state agencies to carry out the above policies through the use of environmental impact statements, the contents of which are prescribed. The third part is the one on which this legislative history will focus - that establishing the Environmental Quality Council and outlining its authority and responsibilities.

It is in this area that MEPA departs somewhat from the National Environmental Policy Act. NEPA sets up the President's Council on Environmental Quality - an executive agency responsible to the Chief Executive. MEPA establishes the Environmental Quality Council, with a structure unique in the United States among entities with similar purpose, as an agency to be composed of members of the Legislature, the public, and the executive branch. EQC was to be an arm of the Legislature with the added public and executive branch diversification. This diversity was intended, according to George Darrow, the Council's first chairman and chief sponsor of MEPA, to assure that a broad perspective would be maintained in the discharge of the Council's responsibilities.

The initial Council members had a clear idea of EQC's role. According to Darrow, "the EQC is not a regulatory agency. It is not an environmental control

agency. Responsibility for these functions lies with various existing agencies in the executive branch of state government. Instead, the Council's role is to anticipate environmental problems, analyze their root causes, perceive alternatives, and recommend preventive action.

The EQC has an important role in maintaining a policy overview of state programs with environmental consequences to assure that state environmental policy is consistently observed. It also fulfills the urgent need for a mechanism within state government to better coordinate and integrate the various environmental programs of state agencies already in existence. In the past, environmental problems have often been dealt with in a piecemeal manner because of the lack of such a mechanism. The Coal Task Force, recommended by the Council and implemented by the governor, illustrates the Council's coordinating, integrating role.

The objective of the Council is to build up the environmental judgment of state agencies rather than to substitute its own. The requirements of an impact statement elevate environmental considerations to parity with economic and technical considerations. Each agency is then responsible for making its own balancing analysis after full disclosure of the consequences involved in its decision. In essence, the environmental impact statement process establishes systematic planning procedures to be observed by all state agencies in the interest of the long-term welfare of Montanans." (First Annual Report, 1972)

Ten years later, as a new Council re-evaluates its role, it may be useful to examine how succeeding legislatures viewed EQC's role and structure and attempted to modify it. The following outline describes the legislative history of EQC.

1973

Sponsor	Legislation	Subject	Purpose	Status
Darrow	SJR 24	EQC Energy Policy Study	To enable the legislature to adopt a comprehensive energy policy.	Adopted; study completed; no official comprehensive policy adopted.
Turman	HJR 9	EQC Land Use Policy Study	To enable the legislature to adopt a comprehensive land use policy.	Adopted; study completed; recommendations rejected in 1975.

Comment: The above two resolutions provided for a major portion of EQC's work in 1973-1975. The Energy Policy Study travelled a bumpy road to completion. It had several study coordinators, and publication of the final report produced modest fanfare and relatively little controversy. Conversely, the Land Use Policy Study, while generally regarded to this day as a high-quality research document, stimulated major debates of an acrimonious nature. In a 1980 President's Council on Environmental Quality Report that overviews the progress of environmental law over the past ten years, the failure of comprehensive land use legislation to gain passage is noted as a significant exception to the record of environmental progress established in other areas. Montana is no exception in its lack of such legislation. The legislative recommendations of the EQC Land Use Policy Study not only failed to gain passage, they established a black mark against EQC in the minds of many legislators concerned with the issue. In addition, other legislation endorsed by EQC had mixed success.

1974

Sponsor	Legislation	Subject	Purpose	Status
Brown	HJR 73	EQC promotion of economic analysis in EIS's	Adequate representation of economic aspects of the total human environment.	Adopted

1975

Sponsor	Legislation	Subject	Purpose	Status
Graham	SB 332	Repeal MEPA (as introduced)	Eliminate function of EQC.	Killed; the bill was later amended to revise appointment of members but was still killed.
Hager	HB 401	Revise EQC members terms and make governor's representative non-voting.	Tie EQC more closely to legislature's control; public members appointed by legislature instead of governor.	Enacted.

Comment: The introduction of SB 332 reflected a growing discontent with EQC's strong environmental philosopy advocacy role. HB 401 was seen as a compromise - a way to make EQC more accountable to the Legislature. Efforts in the form of amendment to the above bills to provide for easier removal of the executive director failed.

1977

Sponsor	Legislation	Subject	Purpose	Status
Story	SJR 14	Reduce the costs and duplication in EIS's	Streamline EIS process; make it more accessible to public.	Adopted.
Dunkle	SB 82	Revise membership of EQC	Remove public members from EQC.	Killed.
Nathe	HB 662	Environmental Policy Planning and Legislation Study	Redefine role of EQC and environmental policy; coordinate environmental planning.	Killed.

1977 (Continued)

Sponsor	Legislation	Subject	Purpose	Status
Warden	SJR 7	Renewable resource research clearing-house	Establish committee to develop an inform-ation system for in-state renewable resource reports.	Killed.
Roskie	SB 302	Specify that MEPA does not expand agency decision-making authority	Reinforce second Beaver Creek South decision; limit scope of MEPA.	Killed.
Hager	SB 388	Amend MEPA	Clarify state agency duties and provide judicial review.	Killed.
Meloy	HB 592	Amend MEPA; specify the governor's role	Give scope to MEPA similar to that of NEPA; expand its authority.	Killed.
Hager	SB 314	Change method of filling vacancies on EQC	Have vacancy filled in same manner as original appointment instead of by Council.	Enacted.

Comment: In 1977, EQC and MEPA were the subject of much legislation and controversy. Yet with the exception of SB 314, the legislature could not agree on a new role for MEPA and EQC, so the status quo, at least statutorily, was maintained. The Council's internal procedures were revised to diminish EQC's controversial image, however.

1979

Sponsor	Legislation	Subject	Purpose	Status
Kraalen	HB 680	Abolish EQC	Retain MEPA; elimi-nate EQC.	Killed.
Hager	SB 246	Change com-position of EQC; change name	Remove public mem-bers, governor's representative; change image.	Killed.

1979 (Continued)

Sponsor	Legislation	Subject	Purpose	Status
Roskie/ Natural Resources Committee	SB 506	Agency decision-making authority	Prohibit expansion of agency decision-making; authorize EQC to review legislation for potential impacts.	Killed.

Comment: Again, the legislature did not reach agreement on a new role for EQC. It did direct EQC to conduct three interim studies: one on bentonite development (HJR 51), another on natural resource permit procedures (HJR 60), and another on promotion of environmentally sound natural resource industries.

1981

Sponsor	Legislation	Subject	Purpose	Status
Kemmis	HB 682	Abolish EQC	EQC's present function no longer viable.	Killed.
Dover	SB 282	Energy and Natural Resources Council	Expand role of EQC as adjudicator of complaints on resource issues.	Killed.
Quilici	HB 398 HB 801	Alternative Energy Program	Give legislative oversight of the program through EQC.	Enacted.

Comment: Again, both efforts to expand EQC's authority and to abolish it were rejected by the 1981 Legislature. A consensus that EQC needed new membership and a renewed sense of direction prevailed, however. EQC's recommended legislation on small-scale hydro-electric development received favorable consideration as did a resolution on rerefined oil; however, other EQC legislative recommendations (HJR 51, HB 506, HB 373) did not fare as well.

The past ten years of legislative activity regarding MEPA and EQC reveal little consensus over their roles. Yet this legislative history identifies what past legislatures have not wanted MEPA and EQC to be. The Environmental Quality Council was established in an era when legislative oversight of government activities was not as popular as it is today. Yet it appears to be a vehicle by which oversight of Montana's natural resource, energy, and environmental programs may be effectively implemented, given proper direction by Council members, the public, and the Legislature as a whole.